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In The
Supreme Court of the United States

WHOLE WOMAN'S HEALTH; AUSTIN WOMEN'S HEALTH CENTER; KILLEEN WOMEN'S HEALTH CENTER; NOVA HEALTH SYSTEMS D/B/A REPRODUCTIVE SERVICES; SHERWOOD C. LYNN, JR., M.D.; PAMELA J. RICHTER, D.O.; AND LENDOL L. DAVIS, M.D., ON BEHALF OF THEMSELVES AND THEIR PATIENTS, PETITIONERS,

v.

KIRK COLE, M.D., COMMISSIONER OF THE TEXAS DEPARTMENT OF STATE HEALTH SERVICES; MARI ROBINSON, EXECUTIVE DIRECTOR OF THE TEXAS MEDICAL BOARD, IN THEIR OFFICIAL CAPACITIES, RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, this Court reaffirmed that the decision to end a pregnancy prior to viability is a fundamental liberty protected by the Due Process Clause. 505 U.S. 833, 845-46 (1992). It held that a restriction on this liberty is impermissible if it amounts to an undue burden. *Id.* at 876-77. Under this standard, states may not enact "[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion." *Id.* at 878.

The questions presented are:

(a) When applying this standard, does a court err by refusing to consider whether and to what extent laws that restrict abortion for the stated purpose of promoting health actually serve the government's interest in promoting health?

(b) Did the Fifth Circuit err in concluding that this standard permits Texas to enforce, in nearly all circumstances, laws that would cause a significant reduction in the availability of abortion services while failing to advance the State's interest in promoting health—or any other valid interest?

QUESTIONS PRESENTED – Continued

II.

Did the Fifth Circuit err in holding that res judicata provides a basis for reversing the district court's judgment in part?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners are Whole Woman's Health; Austin Women's Health Center; Killeen Women's Health Center; Nova Health Systems d/b/a Reproductive Services; Sherwood C. Lynn, Jr., M.D.; Pamela J. Richter, D.O.; and Lendol L. Davis, M.D., plaintiffs below.

None of the corporate Petitioners has a parent company, and no publicly held company owns 10 percent or more of any corporate Petitioner's stock.

Respondents are Kirk Cole, M.D., in his official capacity as Commissioner of the Texas Department of State Health Services, and Mari Robinson, in her official capacity as Executive Director of the Texas Medical Board, defendants below.

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OPINIONS BELOW

The Fifth Circuit's opinion is reported at 790 F.3d 563 and reprinted in the Appendix to the Petition ("App.") at 1a-76a. The Fifth Circuit's order modifying this opinion and denying a stay of the mandate is reported at 790 F.3d 598 and reprinted at App. 77a-78a. The Fifth Circuit's earlier opinion staying the district court's judgment in part is reported at 769 F.3d 285 and reprinted at App. 79a-127a. The district court's opinion is reported at 46 F. Supp. 3d 673 and reprinted at App. 128a-159a. The district court's unpublished order granting in part and denying in part Respondents' motion to dismiss is reprinted at App. 160a-179a.

JURISDICTION

The Fifth Circuit entered judgment on June 9, 2015. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

This case involves U.S. Const. amend. XIV, § 1; House Bill 2 ("H.B. 2" or the "Act"), 83rd Leg., 2nd Called Sess. (Tex. 2013); and 25 Tex. Admin. Code §§ 139.40, 139.53, and 139.56, which are reproduced at App. 180a; 181a-202a; 203a-208a; 209a-214a; and 215a-216a.

INTRODUCTION

This case will determine whether Texas can force more than 75 percent of the State's abortion clinics to

close by enforcing a pair of statutory requirements that serve no valid state interest. The Fifth Circuit upheld the requirements despite findings by the district court that they will not advance the State's asserted interest in promoting women's health but will instead jeopardize women's health by drastically reducing access to safe and legal abortion services throughout the State. The Fifth Circuit's ruling rests on its determination that the undue burden standard does not require—or even permit—inquiry into the extent to which an abortion restriction furthers a valid state interest. It stands in direct conflict with decisions of the Seventh and Ninth Circuits and the Iowa Supreme Court, which hold that courts must examine the extent to which laws regulating abortion actually further a valid state interest in assessing whether the burdens they impose on abortion access are undue.

In rejecting the inquiry mandated by its sister circuits and the Iowa Supreme Court, the Fifth Circuit departs radically from this Court's precedents, permitting states to restrict abortion based on the mere articulation of rational legislative objectives, regardless of whether the restrictions are reasonably designed to further those objectives. Further, the Fifth Circuit's conclusion that the challenged requirements do not have the purpose or effect of creating substantial obstacles to abortion access, even though they would cause a massive reduction in the number and geographic distribution of abortion providers in Texas, cannot be reconciled with this

Court's decisions. Overall, the Fifth Circuit renders the undue burden standard a toothless protection for the fundamental liberty recognized in *Casey*, which has facilitated the "ability of women to participate equally in the economic and social life of the Nation" for more than four decades. *Casey*, 505 U.S. at 856.

If allowed to take effect, the Fifth Circuit's decision would cause profound and irreparable harm to the rights, health, and dignity of women throughout Texas, the second most populous state in the nation. This Court has described the decision to have an abortion as one of "the most intimate and personal choices a person may make in a lifetime[,] central to personal dignity and autonomy." *Id.* at 851. But the challenged requirements "would operate for a significant number of women in Texas just as drastically as a complete ban on abortion." App. 141a. They would delay or prevent thousands of women from obtaining abortions and lead some to resort to unsafe or illegal methods of ending an unwanted pregnancy. To prevent such irreparable harm from occurring on a large scale, this Court has intervened in the case twice already—first after the Fifth Circuit stayed the district court's judgment and again after the Fifth Circuit issued its ruling on the merits. It should now grant review.

This case also presents a res judicata question. The Fifth Circuit's application of res judicata is so obviously and egregiously improper that it begs review by this Court. The court of appeals held that Petitioners' undue burden claims were *not precluded*

to the extent they sought as-applied relief from the challenged requirements, but were precluded to the extent they sought facial relief. This conclusion is baffling. Res judicata bars claims, not remedies. The doctrine cannot be used to limit the scope of relief that a court may grant following the adjudication of an otherwise valid claim. Equally baffling is the Fifth Circuit's ruling that res judicata requires litigants to challenge all provisions of an omnibus statute at the same time—even those provisions awaiting the adoption of implementing regulations. If allowed to stand, this ruling would create perverse incentives for future litigants in a wide variety of cases, encouraging the filing of premature claims that speculate about a law's impact. Although the Court need not reverse the Fifth Circuit's res judicata holding to reach the constitutional issues, given that the holding did not extend to what the Fifth Circuit characterized as Petitioners' "as-applied" claims, the Court should nevertheless grant review on the res judicata question to correct the Fifth Circuit's egregious errors and ensure that Petitioners are able to obtain complete relief from the challenged requirements.

STATEMENT OF THE CASE

A. Statutory And Regulatory Background

On July 18, 2013, Texas enacted H.B. 2, an omnibus statute that imposes a variety of requirements on abortion providers. The Act's provisions include an "admitting-privileges requirement," Act § 2 (codified at Tex. Health & Safety Code Ann.

§ 171.0031(a)(1)(A)); 25 Tex. Admin. Code §§ 139.53(c)(1), 139.56(a)(1), and an "ASC requirement," Act § 4 (codified at Tex. Health & Safety Code Ann. § 245.010(a)); 25 Tex. Admin. Code § 139.40.

The admitting-privileges requirement provides that "[a] physician performing or inducing an abortion must, on the date the abortion is performed or induced, have active admitting privileges at a hospital that is located not further than 30 miles from the location at which the abortion is performed or induced." Tex. Health & Safety Code Ann. § 171.0031(a)(1)(A). It was scheduled to take effect on October 29, 2013. Act § 12.

The ASC requirement amends the existing framework for licensing abortion providers under Texas law to provide that, "the minimum standards for an abortion facility [codified in Chapter 139 of Title 25 of the Texas Administrative Code] must be equivalent to the minimum standards for ambulatory surgical centers [codified in Chapter 135 of the same Title]." Tex. Health & Safety Code Ann. § 245.010(a). The Act directed the Texas Department of State Health Services ("DSHS") to adopt implementing regulations by January 1, 2014, and provided that facilities must be in compliance with those regulations by September 1, 2014. Act § 11.

DSHS proposed regulations to implement the ASC requirement on September 27, 2013, 38 Tex. Reg. 6536-46 (Sept. 27, 2013), and adopted them on December 27, 2013, following a three-month-long

notice-and-comment period during which 19,799 comments were submitted, 38 Tex. Reg. 9577-93 (Dec. 27, 2013). These implementing regulations amended the existing abortion facility regulations to incorporate by reference some of the regulations governing ASCs. *See* 38 Tex. Reg. 6537 But DSHS opted not to incorporate regulations governing ASCs "in instances where [the existing abortion facility regulations] prescribe[ ] more stringent qualifications or safety requirements." *Id.* Further, DSHS decided not to incorporate the ASC regulations providing for grandfathering and waivers from construction requirements. *See* 38 Tex. Reg. 6537, 6540 (declining to incorporate 25 Tex. Admin. Code § 135.51(a)). Consequently, while ASCs are generally eligible for grandfathering and waivers that will not adversely impact patient health or safety, abortion facilities operating under the ASC requirement are not. As a result of these choices made by DSHS, the standards for abortion facilities overall are not "equivalent" to the standards for ASCs; they are far more burdensome than the standards for ASCs.

B. The *Abbott* Litigation

On September 27, 2013, a group of Texas abortion providers filed a case captioned *Planned Parenthood of Greater Texas Surgical Health Services v. Abbott*, challenging two provisions of H.B. 2 that were scheduled to take effect on October 29, 2013: the admitting-privileges requirement and a provision regulating medical abortions (*i.e.*, abortions performed using medication rather than surgery). The

challengers asserted that the two provisions violated the Due Process Clause of the Fourteenth Amendment and requested declaratory and injunctive relief.

Simultaneously with filing the case, the plaintiffs moved for a preliminary injunction. Pursuant to Federal Rule of Civil Procedure 65(a)(2), the district court (Yeakel, J.) consolidated the hearing on that motion with the trial on the merits. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 951 F. Supp. 2d 891, 896 (W.D. Tex. 2013). The trial commenced on October 21, 2013, less than one month after the case was filed. Given the expedited nature of the proceedings, there was no opportunity for pre-trial discovery. Further, the defendants were permitted, over the plaintiffs' objection, to submit all testimonial evidence by declaration. As a result, the plaintiffs had no opportunity to depose any of the defendants' witnesses or to cross-examine them at trial.

On October 28, 2013, the district court issued an opinion and judgment holding the admitting-privileges requirement unconstitutional in all of its applications and the medical-abortion provision unconstitutional in discrete applications. *Id.* at 901, 907-08. The Fifth Circuit stayed the district court's judgment in large part on October 31, 2013—permitting the admitting-privileges requirement to take effect on that day, *see Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 416, 419 (5th Cir. 2013)—and reversed that

judgment in large part on March 27, 2014,[1] *see Abbott*, 748 F.3d at 587

With respect to the admitting-privileges requirement, the Fifth Circuit's analysis was highly fact-dependent, as the district court's analysis had been. Based on the pre-enforcement, trial court record,[2] the Fifth Circuit held that the plaintiffs had failed to meet their burden of proving that the admitting-privileges requirement imposed an undue burden on abortion access because "[a]ll of the major Texas cities, including Austin, Corpus Christi, Dallas, El Paso, Houston, and San Antonio, continue to have multiple clinics where many physicians will have or obtain hospital admitting privileges." *Id.* at 598. In addition, the court concluded that the evidence available at the time failed to show "that abortion practitioners will likely be unable to comply with the privileges requirement." *Id.*

C. District Court Proceedings

After the Fifth Circuit permitted the admitting-privileges requirement to take effect on October 31,

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[1] The Fifth Circuit upheld the admitting-privileges requirement generally but held that it "may not be enforced against abortion providers who timely applied for admitting privileges under the statute but are awaiting a response from the hospital." *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583, 605 (5th Cir. 2014).

[2] The Fifth Circuit declined to consider developments that occurred after the admitting-privileges requirement took effect on October 31, 2013. *See Abbott*, 748 F.3d at 599 n.14.

2013, numerous abortion clinics throughout Texas were forced to close. In addition, on December 27, 2013, DSHS adopted final rules to implement the ASC requirement. *See* 38 Tex. Reg. 9577-93 (Dec. 27, 2013). As adopted, those rules would have forced the vast majority of remaining abortion clinics to close, eliminating all abortion clinics located south and west of San Antonio (including in Corpus Christi and El Paso) and leaving fewer than ten clinics to serve the second largest state in the United States by both population and area.[3]

In light of these factual developments, Petitioners filed this case on April 2, 2014, to challenge the admitting-privileges and ASC requirements on Fourteenth Amendment grounds. Petitioners requested specific declaratory and injunctive relief from the challenged requirements, as well as "such other and further relief as the Court may deem just, proper, and equitable." Fifth Circuit Record on Appeal ("ROA") at 72.

Respondents moved to dismiss Petitioners' complaint, asserting that Petitioners' claims were barred by res judicata and also failed on the merits as a matter of law. The district court (Yeakel, J.) rejected Respondents' res judicata defense because facts

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[3] United States Census Bureau, *U.S. and World Population Clock* (2014), http://www.census.gov/popclock/; United States Census Bureau, *State Area Measurements and Internal Point Coordinates* (2010), http://www.census.gov/geo/reference/state-area.html.

material to Petitioners' claims had occurred after judgment had been entered in *Abbott*. *See* App. 168a-170a. On the merits, the district court held that some of Petitioners' claims failed as a matter of law, but it sustained Petitioners' claims that the admitting-privileges and ASC requirements violated the Due Process Clause by imposing an undue burden on access to abortion. App. 178a.

The court held a bench trial on those claims commencing on August 4, 2014. On August 29, 2014, based on the evidence presented, which included the testimony of nineteen live witnesses, the court found, *inter alia*, that abortion in Texas is extremely safe, *see* App. 145a-146a; the challenged requirements will not enhance the safety of abortion procedures but rather will expose women to greater health risks by severely restricting the availability of legal abortion services, *see* App. 146a-147a; and the challenged requirements had and would force dozens of abortion clinics throughout Texas to close, drastically reducing the number and geographic distribution of licensed abortion providers in the State, *see* App. 138a-139a.

The district court concluded that the challenged requirements, "independently and when viewed as they operate together, have the ultimate effect of erecting a substantial obstacle for women in Texas who seek to obtain a previability abortion." App. 147a. It further concluded that "the severity of the burden imposed by both requirements is not balanced by the weight of the interests underlying them." App. 145a. As a result, the district court held that the

challenged requirements impose an undue burden on abortion access. App. 148a. Its judgment set forth a series of declarations concerning the requirements' constitutional deficiencies, the broadest of which declared both requirements unconstitutional "as applied to all women seeking a previability abortion," and permanently enjoined their enforcement to the extent they had been declared unconstitutional. App. 158a.

D. Appellate Proceedings

Respondents moved for an emergency stay of the district court's judgment pending appeal. A divided panel of the Fifth Circuit granted the motion in nearly all respects on October 2, 2014, forcing over a dozen of Texas' remaining abortion clinics to close immediately. App. 97a-98a; 119a. On October 14, 2014, this Court vacated the stay in substantial part, sustaining the district court's injunction against enforcement of the ASC requirement statewide and sustaining the district court's injunction against enforcement of the admitting-privileges requirement with respect to Petitioners' clinics in McAllen and El Paso. *Whole Woman's Health v. Lakey*, 135 S. Ct. 399 (2014) (mem.). As a result, the clinics that had closed following imposition of the stay were able to reopen.

On June 9, 2015, the Fifth Circuit issued a ruling on the merits. App. 1a-76a. The *per curiam* opinion held that the ASC requirement does not amount to an undue burden on abortion access, except to the extent it imposes physical-plant requirements on the McAllen

clinic. App. 70a. It similarly held that the admitting-privileges requirement does not amount to an undue burden, except as applied to one of the physicians affiliated with the McAllen clinic, Dr. Lynn. App. 71a. The Fifth Circuit vacated most of the district court's injunction but affirmed it in part and modified it in part as follows:

> (1) The State of Texas is enjoined from enforcing [certain parts of the ASC requirement related to construction and fire prevention] against the Whole Woman's Health abortion facility located at 802 South Main Street, McAllen, Texas, when that facility is used to provide abortions to women residing in the Rio Grande Valley (as defined above [to consist of Starr, Hidalgo, Willacy, and Cameron Counties]), until such time as another licensed abortion facility becomes available to provide abortions at a location nearer to the Rio Grande Valley than San Antonio; (2) The State of Texas is enjoined from enforcing the admitting privileges requirement against Dr. Lynn when he provides abortions at the Whole Woman's Health abortion facility located at 802 South Main Street, McAllen, Texas, to women residing in the Rio Grande Valley.

Id. The Fifth Circuit subsequently modified its judgment to provide that "the district court's injunction of the ASC requirement (as defined in the June 9 opinion) as applied to the McAllen facility shall remain in effect until October 29, 2015, at which time

the injunction shall be vacated in part, as delineated and explained in our June 9 opinion." App. 78a.

The Fifth Circuit's ruling hinged on its determination that the undue burden standard does not require—or even permit—inquiry into the extent to which an abortion restriction furthers a valid state interest. App. 48a-49a. ("[T]he district court concluded that H.B. 2 would not further the State's interests in maternal health and increased quality of care. In defense of this approach, [Petitioners] argue that the two requirements at issue are unconstitutional unless they are shown to actually further the State's legitimate interests. We disagree with the [Petitioners] and the district court's approach.") (footnote omitted). The court of appeals explained that its prior decision in *Abbott* had "disavowed the inquiry employed by the district court," and instead required an abortion restriction to be sustained if "any conceivable rationale exists" for its enactment. App. 49a-50a. Respondents satisfied this standard, the court concluded, by asserting a health rationale for the challenged requirements, even though the district court had found that:

- "[Petitioners] . . . demonstrated that women will not obtain better care or experience more frequent positive outcomes at an ambulatory surgical center as compared to a previously licensed facility," App. 146a;
- "Many of the building standards mandated by the act and its implementing

rules have such a tangential relationship to patient safety in the context of abortion as to be nearly arbitrary," *Id.*;

- "[O]bjectives proffered for the [admitting-privileges] requirement are not credible due, in part, to evidence that doctors in Texas have been denied privileges for reasons not related to clinical competency," App. 147a; and
- "Higher health risks associated with increased delays in seeking early abortion care, risks associated with longer distance automotive travel on traffic-laden highways, and the act's possible connection to observed increases in self-induced abortions almost certainly cancel out any potential health benefit," App. 146a.

With respect to Respondents' res judicata defense, the Fifth Circuit held that Petitioners' undue burden claims were not barred by res judicata insofar as Petitioners sought partial invalidation as a remedy, because material facts had developed after entry of judgment in *Abbott*. App. 60a-63a. But it held that res judicata barred the same undue burden claims insofar as Petitioners sought facial invalidation as a remedy, App. 35a-36a; 59a, even though the newly developed facts concerned the statewide impact of the challenged requirements, App. 60a.

On June 29, 2015, this Court stayed the Fifth Circuit's mandate pending the timely filing and disposition of a petition for a writ of certiorari. *Whole*

Woman's Health v. Cole, 135 S. Ct. 2923 (2015) (mem.).

REASONS FOR GRANTING THE WRIT

I. CERTIORARI IS WARRANTED ON THE CONSTITUTIONAL QUESTIONS.

a. The Fifth Circuit's decision is in direct and acknowledged conflict with decisions of the Seventh and Ninth Circuits and the Iowa Supreme Court.

The courts of appeals are divided on the important question of whether, when reviewing a law that regulates abortion on the basis of women's health, a court must examine the extent to which the law actually promotes women's health in determining whether the burdens it imposes on abortion access are undue. The Seventh and Ninth Circuits answer this question affirmatively, as this Court's precedents require. The Fifth Circuit, in contrast, proscribes such an inquiry, maintaining that a law regulating abortion access must be sustained if "any conceivable rationale" exists for its enactment, App. 50a, a position that cannot be reconciled with this Court's decisions. The Iowa Supreme Court recently recognized this conflict, and it joined the Seventh and Ninth Circuits in repudiating the Fifth Circuit's approach.[4]

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[4] In discussing the circuit split on this issue, the Ninth Circuit and Iowa Supreme Court both interpret the Sixth Circuit's opinion in *Planned Parenthood Southwest Ohio Region v. DeWine*, 696 F.3d 490 (6th Cir. 2012), as implicitly adopting

(Continued on following page)

In *Casey*, this Court reaffirmed that the decision to end a pregnancy prior to viability is a fundamental liberty protected by the Due Process Clause. 505 U.S. at 845-46. The Court held, however, that the trimester framework employed in earlier cases was too rigid to permit a proper balancing of that liberty with a state's interest in protecting fetal life. The Court replaced the trimester framework with the undue burden standard to afford greater weight to a state's interest in fetal life from the outset of pregnancy. *See id.* at 876-77 The Court explained that: "A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[5] *Id.* at 877

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the same position as the Fifth Circuit. *See Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905, 914 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 870 (2014) (citing *DeWine*, 696 F.3d at 513-18); *Planned Parenthood of the Heartland, Inc. v. Iowa Bd. of Med.*, 865 N.W.2d 252, 264 (Iowa 2015) (citing same). Although that would signify an even deeper split in authority, Petitioners confine the discussion here to cases that explicitly address the issue on which this Court's review is sought.

[5] The undue burden standard emerged from a long line of cases addressing the protections afforded to individual liberties, and it is an essential component of the continued development of that jurisprudence. Those cases make clear that states may not restrict a fundamental liberty based on the mere articulation of rational legislative objectives; to the contrary, burdens on individual liberty are permissible only to the extent they yield an important public benefit. *See, e.g., Lawrence v. Texas*, 539 U.S. 558, 578 (2003) ("The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.").

"A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it." *Id.* "And a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends." *Id.*

With respect to laws aimed at promoting the state's interest in women's health, this Court explained that, although "the State may enact regulations to further the health or safety of a woman seeking an abortion[,]. . [u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right." *Id.* at 878. Applying this standard, the Court upheld challenged recordkeeping and reporting requirements only after concluding that they were "'reasonably directed to the preservation of maternal health'" and the burdens they imposed were slight. *Id.* at 900-01 (quoting *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 80 (1976)).

Consistent with *Casey*, the Seventh Circuit requires meaningful scrutiny of laws that restrict abortion access in the interest of promoting women's health to ensure that the restrictions actually serve that interest. *See Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 798 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 2841 (2014). In *Van Hollen*, the

court affirmed entry of a preliminary injunction against enforcement of a Wisconsin admitting-privileges law after concluding that the evidence in the record failed to establish that the law would provide any health benefit. *Id.* The court explained: "The cases that deal with abortion-related statutes sought to be justified on medical grounds require not only evidence (here lacking as we have seen) that the medical grounds are legitimate but also that the statute not impose an 'undue burden' on women seeking abortions." *Id.* The court further held that "[t]he feebler the medical grounds, the likelier the burden, even if slight, to be 'undue' in the sense of disproportionate or gratuitous." *Id.*

The Ninth Circuit has adopted a similar approach. In *Humble*, it held that the district court had abused its discretion by failing to preliminarily enjoin enforcement of an Arizona law restricting medical abortion, because the record contained "no evidence whatsoever that the law furthers any interest in women's health." *Humble*, 753 F.3d at 914. The court explained that whether a law is an "[u]nnecessary health regulation[ ]" as that term is used in *Casey* "depends on whether and how well it serves the state's interest." *Id.* at 913. The Ninth Circuit acknowledged the Fifth Circuit's contrary conclusion and rejected it. *Id.* at 914.

Recently, the Iowa Supreme Court joined these courts of appeals in holding that *Casey* requires meaningful judicial scrutiny of laws burdening abortion to ensure that such laws serve a valid state

interest to an extent sufficient to justify the burdens they impose. *Planned Parenthood of the Heartland*, 865 N.W.2d at 264. The court declared: "Like the Seventh and Ninth Circuits, we believe the 'unnecessary health regulations' language used in *Casey* requires us to weigh the strength of the state's justification for a statute against the burden placed on a woman seeking to terminate her pregnancy when the stated purpose of a statute limiting a woman's right to terminate a pregnancy is to promote the health of the woman." *Id.* It, too, expressly rejected the approach taken by the Fifth Circuit. *Id.*

The Fifth Circuit's decision in this case thus stands in direct and acknowledged conflict with the decisions of these other courts. Indeed, it specifically rejected the approach to the undue burden standard adopted in *Van Hollen*, declaring that, "[i]n our circuit, we do not balance the wisdom or effectiveness of a law against the burdens the law imposes." App. 51a. Had the Fifth Circuit been faithful to *Casey* and adopted the view of the undue burden standard employed by the other courts, the outcome of this case would have been different, because the district court concluded that "the severity of the burden imposed by both requirements is not balanced by the weight of the interests underlying them," App. 145a, and indeed, that the challenged requirements fail to promote women's health at all, App. 146a-147a.

Accordingly, this Court's review is warranted to resolve the split in authority caused by the Fifth Circuit's erroneous interpretation of the undue burden

standard and restore uniformity to the application of the Fourteenth Amendment's Due Process Clause.

b. The Fifth Circuit's decision is in conflict with Casey *and other relevant decisions of this Court.*

The Fifth Circuit departed radically from this Court's precedents both in refusing to conduct the meaningful review required by the undue burden standard and in concluding—based on its overly deferential review—that the admitting-privileges and ASC requirements do not have the purpose or effect of creating substantial obstacles to abortion access in Texas. By upholding laws that would cause a significant reduction in the availability of abortion services while failing to actively and effectively further any valid state interest, the Fifth Circuit renders the undue burden standard a hollow protection for the liberty protected by *Casey*.

The Fifth Circuit flouted longstanding precedent in holding—contrary to the Seventh and Ninth Circuits and the Iowa Supreme Court—that the undue burden standard does not require—or even permit—courts to evaluate the extent to which abortion restrictions further a valid state interest. This Court has long maintained that, when reviewing an abortion restriction: "The existence of a compelling state interest in health . is only the beginning of the inquiry. The State's regulation may be upheld only if it is reasonably designed to further that state interest." *City of Akron v. Akron Ctr. for Reprod. Health,*

Inc., 462 U.S. 416, 434 (1983), *overruled in part on other grounds by Casey*, 505 U.S. at 870, 882-87; *accord Danforth*, 428 U.S. at 65-67, 75-79, 80-81. As explained in the prior section, *Casey* merged that inquiry into the undue burden standard.[6] *See* 505 U.S. at 900 (quoting *Danforth*, 428 U.S. at 80).

This Court's subsequent decision in *Gonzales* confirmed the need for courts to ensure that abortion restrictions actively and effectively serve a valid state interest. *See Gonzales v. Carhart*, 550 U.S. 124, 160 (2007) (examining the manner in which the challenged law furthered the government's interest in respect for life). This Court emphasized that courts should not blindly defer to legislative findings; rather, they "retain[ ] an independent constitutional duty to review [such] findings where constitutional rights are at stake." *Id.* at 165.

The Fifth Circuit acknowledged that this Court's precedents require "a law regulating previability abortion" to be "reasonably related to (or designed to further) a legitimate state interest." App. 15a (citing *Casey*, 505 U.S. at 878). Nevertheless, the Fifth

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[6] Further, *Casey*'s inclusion of a purpose prong in the undue burden standard demonstrates that laws restricting abortion may not be sustained based on the mere articulation of rational legislative objectives. Rather, courts must examine whether such laws are reasonably designed to serve the state's asserted interests. A court could not adequately assess whether a law is pretextual if, as the Fifth Circuit held, examination of the fit between its means and ends were forbidden.

Circuit held that its own decision in *Abbott* "disavowed" the need for an inquiry into the extent to which an abortion restriction furthers the state's asserted interest. App. 49a-50a (citing *Abbott*, 748 F.3d at 594). Such blatant defiance of this Court's precedents calls for review.

The Fifth Circuit's analysis of the purpose of the challenged requirements also conflicts with this Court's decisions. For example, the Fifth Circuit erroneously held that the failure of the challenged requirements to benefit women's health does not constitute evidence of their purpose. This Court, however, routinely considers a law's failure to serve its stated goals as evidence of an improper purpose. *See, e.g.*, *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2669 (2011); *Romer v. Evans*, 517 U.S. 620, 632 (1996). Notably, in *Danforth*, this Court held that the lack of fit between Missouri's ban on saline amniocentesis as a method of second-trimester abortion, and the State's asserted interest in promoting women's health suggested that the real aim of the law was to restrict the availability of second-trimester abortion services. *See* 428 U.S. at 78-79 ("[T]he outright legislative proscription of saline fails as a reasonable regulation for the protection of maternal health. It comes into focus, instead, as an unreasonable or arbitrary regulation designed to inhibit, and having the effect of inhibiting, the vast majority of abortions after the first 12 weeks.").

Similarly, the Fifth Circuit improperly held that the effect of the challenged requirements cannot

constitute evidence of their purpose. App. 46a. This Court has long recognized that "the effect of a law in its real operation is strong evidence of its object."[7] *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 535 (1993); *accord United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013) (holding that a challenged statute's "operation in practice confirms [its] purpose"). The Fifth Circuit also rejected the disparate treatment of abortion providers as evidence of an improper purpose despite the many decisions of this Court recognizing that laws targeting a particular group for disfavored treatment are more likely to have an improper purpose than those that are neutral and generally applicable. *See, e.g.*, *Windsor*, 133 S. Ct. at 2693-94; *Romer*, 517 U.S. at 633; *Church of the Lukumi*, 508 U.S. at 524.

Finally, the Fifth Circuit's analysis of the effects of the challenged requirements cannot be reconciled with this Court's decisions, which require courts to conduct a contextualized analysis of a law's impact on women's ability to access abortion services. In *Casey*, for example, the Court held that a spousal-notification requirement created a substantial obstacle to abortion access, because married women

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[7] The Fifth Circuit's reliance on *Mazurek v. Armstrong*, 520 U.S. 968 (1997), for a contrary conclusion is misplaced. App. 46a. Far from holding that purpose and effect are independent inquiries, *Mazurek* held it erroneous to conclude that a law had the purpose of imposing a substantial obstacle to abortion access when it could not possibly have had that effect. *See* 520 U.S. at 973-74.

affected by domestic violence were "likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases." 505 U.S. at 894. In reaching this conclusion, the Court drew inferences based on demographic data, the incidence of women affected by domestic violence, and qualitative testimony concerning the expected impact of the spousal-notification requirement on such women, explaining that "[w]e must not blind ourselves to the fact[s]" of women's lives. *Id.* at 888-94. The Fifth Circuit, however, rebuked the district court for conducting the same kind of analysis, holding it was wrong to conclude that the admitting-privileges and ASC requirements created substantial obstacles to abortion access based on its finding that:

> [T]ravel distances [resulting from widespread clinic closures] combine[] with the following practical concerns to create a *de facto* barrier to abortion for some women: "lack of availability of child care, unreliability of transportation, unavailability of appointments at abortion facilities, unavailability of time off from work, immigration status and inability to pass border checkpoints, poverty level, the time and expense involved in traveling long distances, and other, inarticulable psychological obstacles."

App. 55a. The Fifth Circuit's refusal to permit the district court to examine the increased obstacles that women would face in accessing abortion services as a

result of the challenged requirements cannot be reconciled with *Casey*.

Further, the Fifth Circuit's failure to find that the abrupt closure of more than 75 percent of Texas abortion clinics would create substantial obstacles to abortion access makes a mockery of the standard articulated in *Casey*. Such a steep decline in the number of abortion providers—without any change in the demand for abortion services—"does not merely make abortions a little more difficult or expensive to obtain." *Casey*, 505 U.S. at 893. Instead, as the district court found, it would "undeniably reduce meaningful access to abortion care for women throughout Texas[,] operat[ing] for a significant number of women . . . just as drastically as a complete ban on abortion." App. 141a. Under this Court's precedents, such effects are constitutionally impermissible.

In sum, certiorari is warranted because the Fifth Circuit's decision is in direct conflict with relevant decisions of this Court.

II. CERTIORARI IS WARRANTED ON THE RES JUDICATA QUESTION.

a. *The Fifth Circuit's adherence to a rigid dichotomy between facial and as-applied challenges is in conflict with this Court's decision in* Citizens United.

After concluding that Petitioners' "as-applied" undue burden claims were not barred by res judicata

because they are based on facts that occurred after judgment was entered in *Abbott*,[8] App. 60a, the Fifth Circuit erred in holding that the very same undue burden claims were barred to the extent they sought facial invalidation of the challenged requirements.[9] Res judicata precludes claims, not remedies. The doctrine—intended to promote judicial economy and

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[8] It is well-settled that res judicata does not preclude claims based on material facts that occurred after judgment was entered in a prior case. *See Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 328 (1955); Restatement (Second) of Judgments § 24 cmt. f (Am. Law Inst. 1982) ("Material operative facts occurring after the decision of an action with respect to the same subject matter may in themselves, or taken in conjunction with the antecedent facts, comprise a transaction which may be made the basis of a second action not precluded by the first. Where important human values are at stake, even a slight change of circumstances may afford a sufficient basis for concluding that a second action may be brought.").

[9] The Court can reach the constitutional questions without reversing the Fifth Circuit's application of res judicata. Petitioners' "as-applied" claims provide a vehicle for the Court to resolve the split in authority concerning the extent to which a law that restricts abortion must further a valid state interest. And if the Court were to conclude that the challenged requirements constitute an undue burden in all or a large fraction of their applications, it would be free to invalidate them broadly. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 320, 331 (2010) (quoting Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1339 (2000)) ("[O]nce a case is brought, no general categorical line bars a court from making broader pronouncements of invalidity in properly 'as-applied' cases."). Nevertheless, in an excess of caution, Petitioners ask the Court to grant certiorari on the res judicata question to ensure that they are able to obtain complete relief from the challenged requirements.

avoid the costs of redundant litigation—is not intended to limit the scope of relief that a court may grant following the adjudication of an otherwise valid claim. If, as here, a claim rests on facts that developed after the entry of judgment in a prior case, the claim is not barred by the prior judgment and a court may award any remedy that is otherwise appropriate. The Fifth Circuit's adherence to a rigid dichotomy between facial and as-applied challenges is in direct conflict with this Court's precedents, most notably *Citizens United*. *See* 558 U.S. at 331 (holding a statutory provision unconstitutional on its face, even though the plaintiff had challenged it only on an as-applied basis) ("[T]he distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge. [I]t goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint.").[10]

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[10] *Accord Citizens United*, 558 U.S. at 375 (Roberts, C.J., joined by Alito, J., concurring) ("Because it is necessary to reach Citizens United's broader argument that *Austin* should be overruled, the debate over whether to consider this claim on an as-applied or facial basis strikes me as largely beside the point."); *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2458 (2015) (Scalia, J., joined by Roberts, C.J., & Thomas, J., dissenting) ("[T]he effect of a given case is a function not of the plaintiff's characterization of his challenge, but the narrowness or breadth of the ground that the Court relies upon in disposing of it. I see no reason why a plaintiff's self-description of his challenge as facial would provide an independent reason to reject it unless we were to delegate to litigants our duty to say what the law is.").

The Fifth Circuit's error is particularly egregious given that the newly-developed facts on which it relies to conclude that Petitioners' as-applied claims are not precluded concern the *statewide* effects of the challenged requirements—namely, widespread clinic closures; the inability of physicians to obtain admitting privileges despite diligent effort; and the impact of the diminished pool of doctors and facilities providing abortions on women's access to those services. *See* App. 60a ("We now know with certainty that the non-ASC abortion facilities have actually closed and physicians have been unable to obtain admitting privileges after diligent effort. Thus, the actual impact of the combined effect of the admitting-privileges and ASC requirements on abortion facilities, abortion physicians, and women in Texas can be more concretely understood and measured."). These facts plainly support the district court's award of facial relief.[11] Accordingly, the Fifth Circuit had no tenable grounds for concluding that the newly-developed facts were material to Petitioners' undue burden claims only insofar as those claims sought as-applied relief.

The Fifth Circuit's application of res judicata thus evinces a fundamentally flawed understanding of the distinction between facial and as-applied challenges. The consequences of this error are serious and far-reaching, threatening to further muddle

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[11] Indeed, it was the absence of these facts from the pre-enforcement record in *Abbott* that led the Fifth Circuit to reverse the district court's judgment granting facial relief. *See Abbott*, 748 F.3d at 597-99.

an area of jurisprudence that is already racked with confusion and distort the adjudication of challenges to a broad array of statutory provisions. Accordingly, this Court should grant review.

b. The Fifth Circuit's improper application of res judicata to bar multiple challenges to an omnibus statute creates perverse incentives for future litigants.

"The preclusive effect of a federal-court judgment is determined by federal common law," *Taylor v. Sturgell*, 553 U.S. 880, 891 (2008), which prescribes a transactional test to determine whether two cases involve the same claim for res judicata purposes, *see generally United States v. Tohono O'Odham Nation*, 131 S. Ct. 1723, 1730 (2011); Restatement (Second) of Judgments § 24. This test is "pragmatic[ ]," not formal, and turns on whether the claims under consideration are based on a "common nucleus of operative facts." Restatement (Second) of Judgments §§ 24(2); 24 cmt. b. "Among the factors relevant to a determination whether the facts are so woven together as to constitute a single claim are their relatedness in time, space, origin, or motivation, and whether, taken together, they form a convenient unit for trial purposes." *Id.* § 24 cmt. b.

Although the Fifth Circuit paid lip service to this test, it failed to apply it faithfully. The test is not satisfied merely because the ASC requirement was enacted as part of an omnibus statute that also included the provisions challenged in *Abbott*. The ASC requirement operates independently from those

provisions, as evidenced by its distinct effective date and the need for implementing regulations to give it effect. Further, Petitioners' claims against the ASC requirement called for different proof than the claims in *Abbott*. Indeed, during a pre-trial hearing, Respondents' counsel advocated bifurcating the trial because the ASC requirement raised different factual issues and would require different proof than the admitting-privileges requirement. ROA.2785-86.

Critically, before December 27, 2013, when DSHS adopted final regulations to implement the ASC requirement, Petitioners did not know the extent of the burdens that it would impose, because they did not know whether abortion facilities would be eligible for waivers or grandfathering on equivalent terms with ASCs.[12] Had the regulations made abortion

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[12] Courts generally treat the ability of facilities to seek waivers and grandfathering as a relevant—and sometimes dispositive—consideration in assessing the constitutionality of abortion-facility licensing schemes, particularly when they impose construction requirements. *See, e.g.*, *Simopoulos v. Virginia*, 462 U.S. 506, 515 (1983) (upholding requirement that second-trimester abortions be performed in outpatient surgical facilities) ("The second category of requirements outlines construction standards for outpatient surgical clinics, but also provides that deviations from the requirements prescribed herein may be approved if it is determined that the purposes of the minimum requirements have been fulfilled.") (internal quotation marks omitted); *Planned Parenthood of Ind. & Ky., Inc. v. Comm'r, Ind. Dep't of Health*, 64 F. Supp. 3d 1235, 1260 (S.D. Ind. 2014) (holding that a licensing scheme that denied abortion clinics the opportunity to seek waivers to the same extent as hospitals and ASCs violated equal protection) ("The

(Continued on following page)

facilities eligible for waivers or grandfathering, Petitioners would have applied for such administrative relief and attempted to become licensed. If successful, they would not have challenged the ASC requirement in court.

By compelling litigants who challenge one provision of a statutory scheme to challenge all provisions simultaneously—even those awaiting the adoption of implementing regulations—or risk preclusion later, the Fifth Circuit's decision encourages the filing of premature claims that speculate about the impact a law will have. Such claims are disfavored by this Court. *See, e.g.*, *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008). Thus, certiorari is warranted to prevent the Fifth Circuit's improper application of res judicata from creating perverse incentives for future litigants in a wide range of cases.

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abortion clinic waiver prohibition specifically targets 'abortion clinics' by prohibiting them from obtaining a rule waiver, even in cases that will not adversely affect the health of the patients."); *Planned Parenthood of Kan. & Mid-Mo., Inc. v. Drummond*, No. 07-4164-CV-C-ODS, 2007 WL 2811407, at *8 (W.D. Mo. Sept. 24, 2007) (preliminarily enjoining an ASC requirement for abortion providers) ("[W]hether application of the New Construction regulations is a violation of Plaintiffs' constitutional rights depends on what these regulations actually require. This, in turn, depends on whether and to what extent deviations and/or waivers are permitted by DHSS.").

III. CERTIORARI IS NEEDED TO AVOID A DRASTIC REDUCTION IN ACCESS TO SAFE ABORTION SERVICES IN THE SECOND MOST POPULOUS STATE IN THE NATION.

The outcome of this case is a matter of exceptional importance because the rights, health, and dignity of thousands of women are at stake. Texas is the second most populous state in the nation—home to 5.4 million women of reproductive age. App. 53a. More than 60,000 of those women choose to have an abortion each year. App. 56a. If the Court declines to review this case, its stay of the Fifth Circuit's mandate would immediately terminate. The resulting reduction in the number and geographic distribution of abortion providers means that many of those women would be significantly delayed in accessing abortion services, and some would be unable to access such services at all. *See* App. 141a-144a; *Van Hollen*, 738 F.3d at 796 ("Patients will be subjected to weeks of delay because of the sudden shortage of eligible doctors—and delay in obtaining an abortion can result in the progression of a pregnancy to a stage at which an abortion would be less safe, and eventually illegal."). Further, every woman in Texas would have to live under a legal regime that fails to respect her equal citizenship status and would force her to grapple with unnecessary and substantial obstacles as a condition of exercising her protected liberty.

This Court has described the decision to have an abortion as one of "the most intimate and personal

choices a person may make in a lifetime, central to personal dignity and autonomy." *Casey*, 505 U.S. at 851. It explained that "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education" are "central to the liberty protected by the Fourteenth Amendment." *Id.*; *accord Obergefell v. Hodges*, 135 S. Ct. 2584, 2597-98 (2015). Thus, the right at issue in this case is of exceptional importance, and the ultimate disposition of this case will have a profound effect on the lives of thousands of women and their families. It will also have a profound effect on the nation's understanding of the meaning of the liberty protected by the Fourteenth Amendment and the nature and extent of the burdens that a state can make an individual endure as a condition of exercising that liberty.

Prior to the enactment of H.B. 2, there were more than 40 facilities providing abortions in Texas, dispersed throughout the State. App. 138a. To date, that number has dwindled to 18.[13] If the stay entered by this Court is terminated, that number would fall to ten. That would amount to a net reduction in abortion facilities of more than 75 percent in a

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[13] Since this Court stayed the Fifth Circuit's mandate on June 29, 2015, an additional clinic in Dallas closed as a result of the admitting-privileges requirement. Only one of the two physicians working at the clinic prior to H.B. 2's enactment was able to maintain hospital admitting-privileges. The clinic operated for as long as it could with a single physician but ultimately could not sustain its practice with that limitation on its capacity.

two-year period. Further, one of the remaining ten clinics—Whole Woman's Health of McAllen—would be limited to employing a single physician to provide abortions, even though at least four physicians were providing abortions there prior to implementation of H.B. 2. App. 70a-71a. The sole physician permitted by the Fifth Circuit to practice at the McAllen clinic is past retirement age and unable to work there full-time. ROA.2461. The McAllen clinic would also be limited to treating patients who reside in the four counties of the Lower Rio Grande Valley. Under the terms of the Fifth Circuit's ruling, it would have to turn away women from neighboring counties. App. 71a. Thus, its capacity to meet patient demand in the region would be extremely limited. The next closest abortion provider would be in San Antonio, well over 200 miles away. *See* App. 65a.

Apart from the McAllen clinic, Texas' remaining abortion providers would be clustered in four metropolitan areas: Dallas-Fort Worth, Austin, San Antonio, and Houston. App. 28a. There would be no licensed abortion facilities west of San Antonio, a region occupying over a hundred-thousand square miles, and the only abortion clinic south of San Antonio would be the McAllen clinic. Even if women throughout Texas could navigate the vast distances necessary to reach the remaining few abortion providers, the district court found that these facilities would not be able to meet the statewide demand for abortion services that sustained more than 40 abortion facilities prior to the enactment of the challenged requirements. *See*

App. 141a. Moreover, the ability of these remaining facilities to increase their operational capacities would be constrained by the admitting-privileges requirement. Indeed, at the time of trial, at least one of them was unable to schedule patients for abortion procedures because it did not have a doctor on staff with the required admitting privileges. ROA.2854. And the district court found that, because of the tremendous costs of compliance with the ASC requirement, "few, if any, new compliant abortion facilities will open to meet the demand resulting from existing clinics' closure." App. 140a.

The initial reduction in abortion providers following implementation of the admitting-privileges requirement had a significant negative impact on women's ability to obtain an abortion in Texas, causing delays in obtaining services that led to an increase in the proportion of abortions performed in the second trimester and preventing some women from accessing abortion services at all. ROA.2349-50, ROA.2354, ROA.2359. Allowing the Fifth Circuit's decision to stand would further reduce the availability of abortion services in Texas, exacerbating these impacts.

Women who are delayed in obtaining an abortion face greater health risks than those who are able to obtain early abortions because the risks of abortion, although slight throughout pregnancy, increase with gestational age. ROA.2372. Women who are unable to obtain an abortion are also at increased risk; DSHS's own data shows that, in Texas, the risk of

death from carrying a pregnancy to term is 100 times greater than the risk of death from having an abortion. ROA.2950-51; *see also* ROA.2377.

In addition, some women who are unable to access legal abortion turn to illegal and unsafe methods of ending a pregnancy. *See, e.g.*, *McCormack v. Hiedeman*, 694 F.3d 1004, 1008 (9th Cir. 2012) (concerning a pregnant woman who attempted abortion by ingesting drugs purchased from the internet because she could not access clinical abortion services); *In re J.M.S.*, 280 P.3d 410, 411 (Utah 2011) (concerning a pregnant woman who attempted abortion by soliciting a stranger to punch her in the abdomen because she could not access clinical abortion services); *Hillman v. State*, 503 S.E.2d 610, 611 (Ga. Ct. App. 1998) (concerning a pregnant woman who attempted abortion by shooting herself in the abdomen because she could not access clinical abortion services).[14] This trend has been on the rise in Texas since the first wave of clinic closures, and it is expected to increase if the availability of safe and legal abortion services remains severely restricted by H.B. 2. *See* ROA.2468; ROA.2471-72; Trial Exs. P-020, P-022, P-024.

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[14] *See also* Emily Bazelon, *A Mother in Jail for Helping Her Daughter Have an Abortion*, N.Y. Times Mag. (Sept. 22, 2014), http://nyti.ms/1rhxibl (reporting that a Pennsylvania mother of three is currently serving time in prison for helping her teenage daughter purchase abortion-inducing drugs from the internet).

Accordingly, even if the Court were ultimately to address the questions presented here in other cases, the harm done to Texas women in the meantime could not be undone. Certiorari is therefore warranted in this case to avoid the profound and irreparable harm that would result from allowing the Fifth Circuit's decision to go unreviewed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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SEPTEMBER 2, 2015

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14-50928

WHOLE WOMAN'S HEALTH; AUSTIN WOMEN'S HEALTH CENTER; KILLEEN WOMEN'S HEALTH CENTER; NOVA HEALTH SYSTEMS, doing business as Reproductive Services; SHERWOOD C. LYNN, JR., M.D., on behalf of themselves and their patients; PAMELA J. RICHTER, D.O., on behalf of themselves and their patients; LENDOL L. DAVIS, M.D., on behalf of themselves and their patients,

Plaintiffs-Appellees—Cross-Appellants

v.

KIRK COLE, M.D., Commissioner of the Texas Department of State Health Services, in his Official Capacity; MARI ROBINSON, Executive Director of the Texas Medical Board, in her Official Capacity,

Defendants-Appellants—Cross-Appellees

Appeals from the United States District Court
for the Western District of Texas

(Filed Jun. 9, 2015)

Before PRADO, ELROD, and HAYNES, Circuit Judges.

PER CURIAM:

Plaintiffs, Texas abortion providers, sued State of Texas officials ("the State")[1] seeking declaratory and injunctive relief against the enforcement of recent amendments to Texas's law regulating abortions. *See* 2013 Texas House Bill No. 2 ("H.B. 2").[2] Plaintiffs challenge H.B. 2's physician admitting privileges requirement as applied to a McAllen and an El Paso abortion facility. Plaintiffs also challenge H.B. 2's requirement that abortion facilities satisfy the standards set for ambulatory surgical centers facially and as applied to the McAllen and El Paso abortion facilities. The district court enjoined enforcement of both requirements "*as applied to all women seeking a previability abortion,*" and as applied to the McAllen and El Paso abortion facilities. *Whole Woman's Health v. Lakey*, 46 F. Supp. 3d 673, 676 (W.D. Tex. 2014) (emphasis added). The State appeals the entry

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[1] The Plaintiffs include Whole Woman's Health; Austin Women's Health Center; Killeen Women's Health Center; Nova Health Systems d/b/a Reproductive Services; and Sherwood C. Lynn, Jr., M.D., Pamela J. Richter, D.O., and Lendol L. Davis, M.D., on behalf of themselves and their patients. The Defendants are Kirk Cole, M.D., Commissioner of the Texas Department of State Health Services, and Mari Robinson, Executive Director of the Texas Medical Board, in their official capacities.

[2] Act of July 12, 2013, 83rd Leg., 2d C.S., ch. 1, §§ 1-12, 2013 Tex. Sess. Law Serv. 4795-802 (West) (codified at TEX. HEALTH & SAFETY CODE ANN. §§ 171.0031, 171.041-.048, 171.061-.064, & amending §§ 245.010-.011; amending TEX. OCC. CODE ANN. §§ 164.052 & 164.055).

of declaratory and injunctive relief.[3] Plaintiffs cross-appeal the dismissal of their additional equal-protection and unlawful-delegation claims.

After carefully considering the record in light of the parties' extensive written and oral arguments, we AFFIRM the district court's dismissal of the Plaintiffs' equal-protection and unlawful-delegation claims, AFFIRM in part and MODIFY in part the district court's injunction of the admitting privileges and ASC requirements as applied to McAllen, VACATE the district court's injunction of the admitting privileges requirement as applied to "all women seeking a previability abortion," and REVERSE the district court's facial injunction of the ASC requirement, injunction of the ASC requirement in the context of medication abortion, and injunction of the admitting privileges and ASC requirements as applied to El Paso.

In plain terms, H.B. 2 and its provisions may be applied throughout Texas, except that Supreme Court precedent requires us to partially uphold the district court's injunction of the ASC requirement as applied to the Whole Woman's Health abortion facility in McAllen, Texas, and to uphold the district court's

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[3] As discussed more fully below, upon the State's motion, a panel of this court partially stayed the district court's judgment pending appeal. *See Whole Woman's Health v. Lakey*, 769 F.3d 285 (5th Cir. 2014). Upon Plaintiffs' application, the Supreme Court vacated the stay in part. *See Whole Woman's Health v. Lakey*, 135 S. Ct. 399 (2014).

injunction of the admitting privileges requirement as applied to Dr. Lynn when he is working at the McAllen facility.

I. Jurisprudential Background

So that our decision may benefit from a full understanding of the pertinent historical and jurisprudential context, we begin by reviewing the regulation of abortion and related Supreme Court cases.

A. Roe v. Wade

The Supreme Court's modern abortion jurisprudence began in 1973 with the landmark case *Roe v. Wade*, 410 U.S. 113 (1973). As with the case before us, *Roe* dealt with a challenge to Texas's regulation of abortion. Texas's penal code made it a crime punishable by imprisonment to procure or attempt to procure an abortion unless medically necessary to save the life of the mother. *Id.* at 117-18 & n.1. Unlike the law presently challenged, the Texas law was not of recent vintage. First enacted in 1854 with few substantial modifications, it was a century old at the time of *Roe*. *See id.* at 116, 119. Nor was Texas's law unique; a majority of the states had similar laws. *See id.* at 116, 118 & n.2.

Reviewing Texas's statute against a backdrop of varying state regulations of abortion, *Roe* assessed the states' interests in regulating abortion, acknowledging a legitimate interest in women's health:

> The State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient. This interest obviously extends at least to the performing physician and his staff, to the facilities involved, to the availability of aftercare, and to adequate provision for any complication or emergency that might arise.

Id. at 150. The Court likewise credited an interest in protecting potential life: "as long as at least *potential* life is involved, the State may assert interests beyond the protection of the pregnant woman alone." *Id.*

Most significantly, however, the Court recognized a constitutional right of privacy "broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.* at 153. While "[t]he Constitution does not explicitly mention any right of privacy," *id.* at 152, the Court relied on its cases recognizing a right of personal privacy in other contexts, which it found to be rooted in the "Fourteenth Amendment's concept of personal liberty and restrictions upon state action," *id.* at 153.

Considering these competing concepts, the Court "conclude[d] that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation." *Id.* at 154. It thus fashioned a constitutional framework that conditioned the states' ability to regulate abortion on a fetus's viability. It held that states may not proscribe

abortion prior to viability—the point at which "the fetus then presumably has the capability of meaningful life outside the mother's womb." *Id.* at 163. After viability, generally at the end of the second trimester, states could proscribe or regulate abortion except when an abortion was necessary to preserve the life or health of the mother. *Id.* at 163-64. The Court drew this line because it believed the interest in potential life to be compelling only after viability. *See id.* at 163.

The Court drew a second line at the end of the first trimester of pregnancy. During the first trimester, states were precluded from interfering with a woman's choice to obtain an abortion. *Id.* From the beginning of the second trimester onward, *Roe* held that "a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health." *Id.* "Examples of permissible state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like." *Id.* The Court drew this line because it believed the interest in the health of the mother became compelling only after the first trimester. *See id.* (crediting evidence "that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth"). Measured

against *Roe's* framework, Texas's law proscribing abortion at all stages of pregnancy was held unconstitutional. *Id.* at 166.

B. The Supreme Court's Review of Abortion Regulations Following Roe

In the approximately twenty-year period following *Roe*, it became a regular practice of the Supreme Court to consider the constitutionality of state abortion regulations. *Roe* was explicitly reaffirmed twice during this period, *see Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 759 (1986); *Akron v. Akron Ctr. for Reprod. Health, Inc.* (*Akron I*), 462 U.S. 416, 420 (1983), before its framework was modified in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). Because *Roe* allowed regulations during the second trimester that were "reasonably related to maternal health," 410 U.S. at 164, the Court had to determine the reasonableness of various health regulations. Some health-based regulations extended into the first trimester, some regulations were based on an interest in potential life but extended into the first or second trimester, and other regulations were said to be justified by interests not recognized in *Roe*. As the Supreme Court reviewed these regulations, two considerations often played a part in the analysis: (1) whether the regulation placed a substantial obstacle

in the path of a woman's choice to obtain an abortion;[4] and (2) whether the regulation was reasonably related to a legitimate government interest.[5]

Relevant here, the Supreme Court addressed various state laws regulating the facilities in which abortions are performed.[6] *Doe v. Bolton*, 410 U.S. 179

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[4] *See, e.g.*, *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 828 (1986) (O'Connor, J., dissenting); *Simopoulos v. Virginia*, 462 U.S. 506, 520 (1983) (O'Connor, J., concurring in part and concurring in the judgment); *Akron v. Akron Ctr. for Reprod. Health, Inc.* (*Akron I*), 462 U.S. 416, 434-35 (1983), *overruled in part by Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833 (1992); *id.* at 453 (O'Connor, J., dissenting); *Harris v. McRae*, 448 U.S. 297, 315 (1980); *Bellotti v. Baird* (*Bellotti II*), 443 U.S. 622, 647 (1979) (Powell, J., plurality opinion); *Maher v. Roe*, 432 U.S. 464, 473-74 (1977); *Bellotti v. Baird* (*Bellotti I*), 428 U.S. 132, 147 (1976).

[5] *See, e.g.*, *Hodgson v. Minnesota*, 497 U.S. 417, 436 (1990) (Stevens, J., plurality opinion); *Thornburgh*, 476 U.S. at 828 (O'Connor, J., dissenting); *Simopoulos*, 462 U.S. at 519; *Akron I*, 462 U.S. at 453 (O'Connor, J., dissenting); *McRae*, 448 U.S. at 324; *Doe v. Bolton*, 410 U.S. 179, 194 (1973); *see also Roe v. Wade*, 410 U.S. 113, 164 (1973) (allowing regulations during the second trimester that were "reasonably related to maternal health").

[6] While not as pertinent to this case, the Supreme Court has addressed various other abortion regulations. The Court has interpreted the Constitution to permit states and the federal government to allocate resources so as to fund childbirth, but not fund abortion or the providing of information about abortion—thus encouraging childbirth over abortion. *See, e.g.*, *Rust v. Sullivan*, 500 U.S. 173, 201-03 (1991); *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 507-10 (1989); *McRae*, 448 U.S. at 318; *Maher*, 432 U.S. at 474. The Supreme Court also upheld general informed consent provisions that required a woman to certify in writing that she consented to an abortion. *See Planned*

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(1973), the Court considered a requirement that all abortions be performed "in a hospital licensed by the State Board of Health and also accredited by the Joint Commission on Accreditation of Hospitals" ("JCAH"). *Id.* at 184. The Court held that the requirement did not withstand constitutional scrutiny because it was "not based on differences that are reasonably related to the purposes of the Act in which it is found." *Id.* at 194 (internal quotation marks omitted). In so concluding, the Court explained that the JCAH standards were general hospital standards not specific to abortion and the state did not require that the performance of non-abortion surgeries be

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Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 65-67 (1976). On the other hand, the Court struck down "abortion regulations designed to influence the woman's informed choice between abortion or childbirth" by requiring the giving of information that goes "far beyond merely describing the general subject matter relevant to informed consent." *Akron I*, 462 U.S. at 444-45, *overruled by Casey*, 505 U.S. at 881-83; *see also Thornburgh*, 476 U.S. at 760, 763, *overruled by Casey*, 505 U.S. at 881-83. The Court also struck down requirements that the information necessary for informed consent be provided by a physician twenty-four hours prior to the abortion, *see Akron I*, 462 U.S. at 448-51, *overruled by Casey*, 505 U.S. at 884-87, and that a woman obtain consent from her spouse to obtain an abortion, *see Danforth*, 428 U.S. at 69. Furthermore, the Court declared unconstitutional laws that "impose a blanket provision requiring the consent of a parent or person *in loco parentis* as a condition for abortion of an unmarried minor. [I]f the State decides to require a pregnant minor to obtain one or both parents' consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained." *Bellotti II*, 443 U.S. at 643 (internal quotation marks omitted).

constrained to JCAH-accredited hospitals. *See id.* at 193. The Court further found the regulation unconstitutional under *Roe* because it applied to abortions performed during the first trimester. *Id.* at 195.

In *Akron I*, 462 U.S. 416, *overruled in part by Casey*, 505 U.S. 833, the Court parsed how stringently states could regulate abortion to protect a mother's health at different stages of pregnancy. It explained that even during the first trimester, "[c]ertain regulations that have no significant impact on the woman's exercise of her right may be permissible where justified by important state health objectives." *Id.* at 430. The Court required these regulations to "not interfere" with the doctor-patient consultation or the woman's choice to obtain an abortion. *Id.* During the second trimester, it allowed states to "regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health" and does not "depart from accepted medical practice." *Id.* at 430-31 (internal quotation marks omitted). The Court applied these principles to invalidate a city ordinance that only allowed abortions in facilities that were part of a full-service hospital. *See id.* at 432-33. The Court held the ordinance "place[d] a significant obstacle in the path of women seeking an abortion" in the form of higher costs to obtain an abortion, increased travel distances, and additional health risks due to increased travel. *Id.* at 434-35. Further, the Court found the health justification for the requirement undercut by "present medical knowledge" that abortions during

the second trimester could safely be performed in a physician's office. *Id.* at 437

In contrast, in *Simopoulos v. Virginia*, 462 U.S. 506, the Supreme Court upheld a state requirement that all second-trimester abortions be performed in a state-licensed "outpatient surgical hospital." *Id.* at 515. The Court explained that the law differed materially from that in *Akron I*:

> The requirements at issue [in *Akron I*] mandated that all second-trimester abortions must be performed in general, acute-care facilities. In contrast, the Virginia statutes and regulations do not require that second trimester abortions be performed exclusively in full-service hospitals. Under Virginia's hospitalization requirement, outpatient surgical hospitals may qualify for licensing as "hospitals" in which second-trimester abortions lawfully may be performed.

Id. at 516 (citation and internal quotation marks omitted). Virginia's law required outpatient surgical hospitals to meet standards in the following categories: (1) "organization, management, policies, procedures, and staffing"; (2) "construction standards," including for "public areas, clinical areas, laboratory and radiology services, and general building"; and (3) "patient care services," including anesthesia, laboratory, pathology, sanitation, laundry, physical plant, medical records, emergency services, and evacuation planning. *Id.* at 515-16 (internal quotation marks omitted).

The Court held that Virginia's outpatient-surgical-hospital requirement was "not an unreasonable means of furthering the State's compelling interest in protecting the woman's own health and safety." *Id.* at 519 (citation and internal quotation marks omitted). The Court explained that, "[i]n view of its interest in protecting the health of its citizens, the State necessarily has considerable discretion in determining standards for the licensing of medical facilities." *Id.* at 516. Unlike in *Akron I*, the Court concluded "[o]n their face, the Virginia regulations appear to be generally compatible with accepted medical standards governing outpatient second-trimester abortions." *Id.* at 517. The Court also saw "no reason to doubt that an adequately equipped clinic could, upon proper application, obtain an outpatient hospital license permitting the performance of second-trimester abortions." *Id.* at 518-19.

C. Planned Parenthood of Southeastern Pennsylvania v. Casey

Nineteen years after *Roe*, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), a divided Court revisited *Roe*. In a joint opinion, Justices O'Connor, Kennedy, and Souter announced the judgment of the Court and delivered the opinion of the Court as to some parts. *Id.* at 843-44. Although parts of the joint opinion were a plurality not joined by a majority of the Court, the joint opinion is nonetheless considered the holding of the Court under *Marks v. United States*, 430 U.S. 188, 193

(1977), as the narrowest position supporting the judgment.[7]

The Court first reaffirmed *Roe*'s "essential holding" that before viability a woman has a constitutional right to choose to terminate her pregnancy.[8] *See* 505 U.S. at 870-71. The Court went on, however, to modify the jurisprudence, reasoning that the legitimate interests of the states as recognized in *Roe* were "given too little acknowledgment and implementation by the Court in its subsequent cases," which decided that "any regulation touching upon the abortion decision must survive strict scrutiny, to be sustained only if drawn in narrow terms to further a compelling state interest." *Id.* at 871 (citing by example *Akron I*, 462 U.S. at 427). The Court found it "an overstatement to describe [the abortion right] as a right to decide whether to have an abortion 'without interference from the State.'" *Id.* at 875 (quoting *Danforth*, 428 U.S. at 61). Those cases that struck down an abortion regulation, "which in no real sense deprived

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[7] *See Stenberg v. Carhart*, 530 U.S. 914, 952 (2000) (Rehnquist, C.J., dissenting) ("Despite my disagreement with the opinion, under the rule laid down in [*Marks*], the *Casey* joint opinion represents the holding of the Court in that case."); *K.P. v. LeBlanc*, 729 F.3d 427, 442 n.93 (5th Cir. 2013); *see, e.g.*, *Stenberg*, 530 U.S. at 921 (majority opinion) (applying *Casey*'s joint opinion).

[8] The Court recognized that "time has overtaken some of *Roe*'s factual assumptions," because modern science and "advances in neonatal care have advanced viability to a point somewhat earlier." *Casey*, 505 U.S. at 860 (comparing *Roe*, 410 U.S. at 160, with *Webster*, 492 U.S. at 515-16).

women of the ultimate decision. went too far." *Id.* Thus, the Court concluded that, in practice, *Roe*'s trimester framework had not given proper effect to the states' legitimate interests, which the Court found exist *throughout pregnancy. See id.* at 872-73, 875-76.

Accordingly, the Court held that a law, to infringe the right recognized in *Roe*, must do more than simply make the right more difficult to exercise. It must impose an *undue burden* on the exercise of that right:

> Numerous forms of state regulation might have the incidental effect of increasing the cost or decreasing the availability of medical care, whether for abortion or any other medical procedure. The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it. Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.

Id. at 874. "A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* at 877 The Court also indicated that if a law does not impose an undue burden on a woman's right to choose an abortion, the law is

constitutional so long as it is reasonably related to, or designed to further, a legitimate state interest:

> Unless it [imposes an undue burden] on her right of choice, a state measure *designed to* persuade her to choose childbirth over abortion will be upheld *if reasonably related to* that goal. Regulations *designed to* foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden.

Id. at 878 (emphasis added). Stated more simply, *Casey* held that a law regulating previability abortion is constitutional if: (1) it does not have the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus; and (2) it is reasonably related to (or designed to further) a legitimate state interest. *See id.*

Overruling precedent, the Court applied this test to uphold the state's requirement that a physician provide the woman information on the risks of abortion, the gestational age of the child, alternatives to abortion, and available assistance if the woman chose to proceed to natural birth. *See id.* at 881-83 (overruling *Akron I*, 462 U.S. at 444, and *Thornburgh*, 476 U.S. at 762). It found the requirement was "a reasonable measure to ensure an informed choice, one which might cause the woman to choose childbirth over abortion," serving the state's "legitimate goal of protecting the life of the unborn." *Id.* at 883. The Court concluded that "[t]his requirement cannot be considered a substantial obstacle to obtaining an

abortion, and, it follows, there is no undue burden." *Id.*[9]

The Court separately upheld a 24-hour waiting period requirement. It found it reasonable to conclude that "important decisions will be more informed and deliberate if they follow some period of reflection," and held that "[i]n theory, at least, the waiting period is a reasonable measure to implement the State's interest in protecting the life of the unborn." *Id.* at 885 (overruling *Akron I*, 462 U.S. at 450). The Court addressed the district court's finding that the 24-hour waiting period, combined with the driving distances to abortion providers, would often produce delays of more than one day, and "for those women who have the fewest financial resources, those who must travel long distances, and those who have difficulty explaining their whereabouts to husbands, employers, or others, the 24-hour waiting period will be particularly burdensome." *Id.* at 886 (internal quotation marks omitted). Despite acknowledging that "the waiting period ha[d] the effect of increasing the cost and risk of delay of abortions," the Court held that the findings did not demonstrate an undue burden. *Id.* (internal quotation marks omitted). The Court reasoned that, although the district court found the requirement imposed a heavier burden on some women, "[a] particular burden is not of necessity a substantial

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[9] The Court also upheld a requirement that a *physician* must provide the information. *See* 505 U.S. at 884-85 (overruling *Akron I*, 462 U.S. at 448).

obstacle. Whether a burden falls on a particular group is a distinct inquiry from whether it is a substantial obstacle even as to the women in that group." *Id.* at 887.

The Supreme Court also facially invalidated Pennsylvania's requirement that, prior to obtaining an abortion, a married woman state that she notified her spouse that she planned to obtain an abortion. *See id.* at 887-98. In light of the domestic abuse that might result from some women notifying their spouses, the Court held that the requirement had the effect of placing a substantial obstacle in the path of a woman's choice to obtain an abortion:

> The spousal notification requirement is thus likely to prevent a significant number of women from obtaining an abortion. It does not merely make abortions a little more difficult or expensive to obtain; for many women, it will impose a substantial obstacle. We must not blind ourselves to the fact that the significant number of women who fear for their safety and the safety of their children are likely to be deterred from procuring an abortion as surely as if the Commonwealth had outlawed abortion in all cases.

Id. at 893-94. Pennsylvania argued that, even given this conclusion, the statute should not be *facially* invalidated because only 20% of women who obtained an abortion were married and 95% of those women voluntarily notified their spouses, resulting in the requirement affecting less than 1% of women seeking

an abortion in Pennsylvania. *See id.* at 894. The Court rejected this argument and facially invalidated the requirement because "in a large fraction of the cases in which [it] is relevant, it [would] operate as a substantial obstacle to a woman's choice to undergo an abortion." *Id.* at 895.[10]

D. Application of Casey

Since *Casey*, the Court has applied the undue burden test three times. In *Mazurek v. Armstrong*, 520 U.S. 968 (1997) (per curiam), the Court reversed an injunction of Montana's requirement that only physicians perform abortions. The Court concluded that the law did not create a substantial obstacle to abortion. *See id.* at 973-74. The Court also rejected the argument that an invalid purpose was proven by a lack of medical evidence:

> Respondents claim in this Court that the Montana law must have had an invalid purpose because all health evidence contradicts the claim that there is any health basis for

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[10] The Court reasoned:

> The analysis does not end with the one percent of women upon whom the statute operates; it begins there. Legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects. The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant.

Id. at 894.

> the law. But this line of argument is squarely foreclosed by *Casey* itself. In the course of upholding the physician-only requirement at issue in that case, we emphasized that "[o]ur cases reflect the fact that the Constitution gives the States broad latitude to decide that particular functions may be performed only by licensed professionals, *even if an objective assessment might suggest that those same tasks could be performed by others.*"

Id. at 973 (alteration in original) (quoting *Casey*, 505 U.S. at 885).

The two other post-*Casey* cases dealt with prohibitions on what has been termed partial-birth abortion, and the cases resulted in divergent conclusions. *Stenberg v. Carhart* involved a Nebraska law making it a felony to perform a partial-birth abortion unless necessary to save the life of the mother. 530 U.S. 914, 921-22 (2000). The Supreme Court held that the law was facially unconstitutional for two reasons. First, the Court found impermissible the lack of a health exception to allow for the partial-birth abortion procedure if necessary to preserve the life *or health* of the mother (as opposed to an exception solely to save the life of the mother, which the statute did contain). *Id.* at 930. Although Nebraska argued that a health exception was unnecessary because other abortion procedures could be safely used, the Court found this argument contradicted by evidence presented in the district court. *Id.* at 931-37 The Court explained that division of medical opinion on the subject favored a

health exception. *Id.* at 937. Second, the Court held the law unconstitutional because it had the "effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus" by encompassing within its statutory definition not only partial-birth abortion, but also the abortion procedure most commonly used during the second trimester of pregnancy—dilation and evacuation ("D & E"). *Id.* at 938 (citation and internal quotation marks omitted).

Gonzales v. Carhart, 550 U.S. 124 (2007), upheld as facially constitutional the Partial-Birth Abortion Ban Act of 2003 ("the Act"), 18 U.S.C. § 1531, which Congress drafted in response to *Stenberg*. *See* 550 U.S. at 132-33, 141. Congress made factual findings that "[a] moral, medical, and ethical consensus exists that the practice of performing a partial-birth abortion . . . is a gruesome and inhumane procedure that is never medically necessary." *Id.* at 141 (alteration in original) (internal quotation marks omitted). Significantly, the Supreme Court interpreted the language of the Act to be more specific and precise than the language of the statute in *Stenberg*, such that it prohibited *only* partial-birth abortion and did not encompass the commonly used D & E procedure. *See id.* at 133, 150-56. The Act contained an exception if the procedure was necessary "to save the life of a mother," which tracked the Nebraska exception struck down in *Stenberg*. *Compare id.* at 141, *with Stenberg*, 530 U.S. at 921-22.

The Supreme Court applied *Casey*'s undue burden test, "assum[ing its] principles for the purpose of

th[e] opinion." 550 U.S. at 146. The Court found, based on Congress's stated reasons for the Act and a "description of the prohibited abortion procedure," that the purpose of the Act was to: (1) "express[] respect for the dignity of human life"; and (2) "protect[] the integrity and ethics of the medical profession." *Id.* at 156-57 (internal quotation marks omitted). Referencing *Casey*, the Court held that the Act was grounded in a legitimate purpose because "government may use its voice and its regulatory authority to show its profound respect for the life within the woman." *Id.* at 157. In explaining why *Casey*'s purpose prong was satisfied, the Court described a rational basis test:

> Where it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power to bar certain procedures and substitute others, all in furtherance of its legitimate interests in regulating the medical profession in order to promote respect for life, including life of the unborn.

Id. at 158.

The Court then applied *Casey*'s "effect" prong, asking whether the Act had the effect of imposing an undue burden by barring partial-birth abortion while not including a health exception. *See id.* at 161-67 The Court explained that "the Act would be unconstitutional, under precedents we here assume to be controlling, if it subject[ed] [women] to significant health risks." *Id.* at 161 (alteration in original) (internal

quotation marks omitted). However, the Court noted "documented medical disagreement whether the Act's prohibition would ever impose significant health risks," *id.* at 162, and held that this medical uncertainty foreclosed facially invalidating the act based on an undue burden:

> The question becomes whether the Act can stand when this medical uncertainty persists. The Court's precedents instruct that the Act can survive this facial attack. The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty.
>
> Physicians are not entitled to ignore regulations that direct them to use reasonable alternative procedures. The law need not give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status above other physicians in the medical community.
>
> Medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts. The medical uncertainty over whether the Act's prohibition creates significant health risks provides a sufficient basis to conclude in this facial attack that the Act does not impose an undue burden.

Id. at 163-64 (citations omitted).

Accordingly, having concluded that the Act did not have the purpose or effect of imposing an undue burden on a woman's right to choose an abortion in a large fraction of relevant cases,[11] the Court upheld the Act against facial challenge. *Id.* at 167-68.

E. This Court's Decision in Abbott II

With this history in mind, in *Planned Parenthood of Greater Texas Surgical Health Services v. Abbott* (*Abbott II*)—an earlier case in which we addressed the constitutionality of the admitting privileges requirement in H.B. 2—we summarized those standards that are also applicable to this case:

> A trio of widely-known Supreme Court decisions provides the framework for ruling on the constitutionality of H.B. 2. In *Roe v. Wade*, the Court held that the Fourteenth Amendment's concept of personal liberty encompasses a woman's right to end a pregnancy by abortion. *Roe v. Wade*, 410 U.S. 113, 153 (1973). In *Casey*, the Court reaffirmed what it regarded as *Roe*'s "essential holding," the right to abort before viability, the point at which the unborn life can survive outside of the womb. *Casey*, 505 U.S. at 870, 878. Before viability, the State may not impose an

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[11] The Court acknowledged without deciding the issue of whether a facial challenge required showing that the law is unconstitutional in all circumstances or, as described in *Casey*, only in a large fraction of the cases in which the law is relevant. *See id.* at 167-68.

> "undue burden," defined as any regulation that has the purpose or effect of creating a "substantial obstacle" to a woman's choice. *Id.* at 874, 878. In *Gonzales*, the Court added that abortion restrictions must also pass rational basis review. *Gonzales*, 550 U.S. at 158 (holding that the State may ban certain abortion procedures and substitute others provided that "it has a rational basis to act, *and* it does not impose an undue burden" (emphasis added)).

748 F.3d 583, 589-90 (5th Cir.), *reh'g en banc denied*, 769 F.3d 330 (5th Cir. 2014).

II. Factual and Procedural Background of this Case

Having set the stage, we now turn to the matters at issue in this case. In 2013, the State of Texas passed H.B. 2, which contained various provisions relating to abortions. H.B. 2 has four primary provisions, of which the Plaintiffs challenge two. The first challenged provision requires a physician performing an abortion to have admitting privileges at a hospital within thirty miles of the location where the abortion is performed (the "admitting privileges requirement"). *See* TEX. HEALTH & SAFETY CODE ANN. § 171.0031(a)(1) (West Supp. 2014). We addressed an earlier facial challenge to this provision in *Abbott II*, 748 F.3d 583.[12]

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[12] The admitting privileges requirement went into effect on October 31, 2013. The district court enjoined the provision, but

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The second provision requires all abortion clinics to comply with standards set for ambulatory surgical centers (the "ASC requirement").[13] *See* TEX. HEALTH & SAFETY CODE ANN. § 245.010(a) (West Supp. 2014). Clinics had until September 2014, nearly fourteen months after H.B. 2 was passed, to comply with the ASC requirement. *Id.* The Texas Legislature's stated purpose for enacting these provisions was to raise the standard and quality of care for women seeking abortions and to protect the health and welfare of women seeking abortions. *See* Senate Comm. on Health & Human Servs., Bill Analysis, Tex. H.B. 2, 83d Leg., 2d C.S. 1 (2013). H.B. 2 contains a "comprehensive and careful severability provision," *Abbott II*, 748 F.3d at 589, as do the implementing regulations. *See* H.B. 2 § 10(b); 25 TEX. ADMIN. CODE § 139.9.

Adopted in December 2013, the regulations implementing the ASC requirement mandate that abortion facilities satisfy the standards applicable to ASCs in addition to any standards specifically applicable to abortion facilities. *See* 25 TEX. ADMIN. CODE § 139.40; 38 Tex. Reg. 9577 (Dec. 27, 2013). The

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we stayed the injunction on October 31, 2013, *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott (Abbott I)*, 734 F.3d 406, 419 (5th Cir.2013), and thereafter vacated the injunction, *see Abbott II*, 748 F.3d at 605.

[13] An ambulatory surgical center is "a facility that operates primarily to provide surgical services to patients who do not require overnight hospital care." TEX. HEALTH & SAFETY CODE ANN. § 243.002(1) (West 2010).

regulatory standards for ASCs fall into three categories: (1) operating requirements, including requirements for records systems, patient rights, quality assurance, staffing, and cleanliness, 25 TEX. ADMIN. CODE §§ 135.4-.17, 135.26-.27; (2) fire prevention and general safety requirements, *id.* §§ 135.41-.43; and (3) physical plant requirements, which include location, physical construction, electrical, plumbing, and HVAC requirements, *id.* §§ 135.51-.56.

Shortly after H.B. 2 was passed, some of the same parties named in this case[14] sued the State of Texas seeking to invalidate certain provisions of H.B. 2, specifically, the admitting privileges requirement

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[14] Planned Parenthood, the largest provider of abortion services in Texas, is not a party to this lawsuit, although it was a named plaintiff in *Abbott II*. Lamar Robinson, M.D. was a named plaintiff in *Abbott II* and was originally a named plaintiff in this case. However, on June 3, 2014, he filed a Notice of Voluntary Dismissal because he obtained admitting privileges at a hospital within thirty miles of the clinic at which he provided abortions.

Otherwise, Plaintiffs largely overlap with the plaintiffs in *Abbott II*. Whole Woman's Health, Austin Women's Health Center, Killeen Women's Health Center, and Dr. Richter were plaintiffs in *Abbott II*. 748 F.3d 583 Doctors Lynn and Davis were not parties in *Abbott II*, but Whole Woman's Health and Austin Women's Health Center, respectively, sued on their behalf. *See* Complaint, Doc. No. 1, ¶¶ 13-14, *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, No. 1:13-CV-862-LY (W.D. Tex.) (stating that clinics were suing "on behalf of" their "physicians"). Reproductive Services was not a plaintiff in *Abbott II*, but Dr. Richter, its medical director and sole abortion-performing physician, was a plaintiff. *See id.* ¶ 21.

and the provision requiring compliance with the FDA protocol for what is known as "medication abortions" (the use of drugs to induce an abortion rather than performing a surgical procedure) (the "medication abortion provision"). In that case, the district court granted relief to the plaintiffs in part, *see Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 951 F. Supp. 2d 891, 909 (W.D. Tex. 2013), and we first granted a stay, *see Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott* (*Abbott I*), 734 F.3d 406, 419 (5th Cir. 2013), and later affirmed in part and reversed in part, *see Abbott II*, 748 F.3d at 605. The time for seeking certiorari from the United States Supreme Court passed, and no petition was filed. In that earlier challenge to H.B. 2, the Plaintiffs did not raise any issues regarding the ASC requirement.

Instead, they waited until April of 2014, one week after the adverse decision in *Abbott II*, to file this lawsuit challenging Texas's requirement that abortion facilities satisfy the standards set for ASCs. Together with a facial challenge to the ASC requirement, they also challenged the admitting privileges requirement and the ASC requirement as applied to Whole Woman's Health's abortion facility in McAllen and Reproductive Services' abortion facility in El Paso. In addition, the Plaintiffs challenged H.B. 2 on several other grounds, including that it denies equal protection, unlawfully delegates lawmaking authority, and constitutes arbitrary and unreasonable state action. Before trial, the district court granted the

State's motion to dismiss claims based on these other grounds.

After a four-day bench trial employing a highly-abbreviated format for the presentation of evidence, the district court enjoined enforcement of the admitting privileges requirement and ASC requirement *"as applied to all women seeking a previability abortion,"* and as applied to the McAllen and El Paso abortion facilities. *Lakey*, 46 F. Supp. 3d at 676, 687 (emphasis added). The district court also enjoined the ASC requirement as applied to medication abortions. *Id.*

At trial, the parties stipulated to the following facts. Seven ASCs in five major Texas cities (Austin, Dallas, Fort Worth, Houston, and San Antonio) were licensed to perform abortions and would be able to continue providing abortions after the ASC requirement went into effect. No other facility in Texas licensed to perform abortions satisfied the ASC requirement, and, thus, these other facilities would be prohibited from performing abortions after the ASC requirement went into effect on September 1, 2014. The parties further stipulated that Planned Parenthood of South Texas planned to open an ASC in San Antonio in September 2014. The district court accepted these stipulated facts, stating that the ASC requirement would "reduce the number of licensed abortion-providing facilities to, at most, eight." *Id.* at

681.[15] The district court also found that Texas had over forty abortion clinics prior to H.B. 2, but the district court did not discuss whether some of these clinics may have closed for reasons unrelated to H.B. 2.[16] *See id.* Both parties offered expert testimony at trial as to the increased travel distances that women would face to obtain an abortion due to H.B. 2. The district court credited the testimony of the Plaintiffs' expert, Dr. Grossman, and found that, due to H.B. 2,

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[15] The State points out that it did not stipulate that *only* eight abortion facilities would remain in Texas, arguing that currently licensed abortion facilities that do not comply with the ASC requirement might buy, build, or lease a licensed ASC. The parties stipulated that there were "433 licensed ambulatory surgical centers in Texas." There was testimony at trial that Dr. Davis and Austin Woman's Health Center purchased land in Austin with plans to open an ASC in the future and that Reproductive Services hoped to open an ASC in San Antonio. The fact that there are currently licensed ASCs in Texas where abortions are performed and that abortion providers have plans to open more attests that it is indeed possible for abortion providers to comply with the ASC requirement. Conversely, the Plaintiffs offered testimony that their efforts to lease an existing ASC failed primarily due to hostility to abortion. The evidence thus showed that there will be *at least* eight licensed ASCs in Texas where abortions are performed.

[16] For example, we noted in *Abbott I* and *II* that abortion facilities had difficulty recruiting physicians with admitting privileges because a large proportion of physicians performing abortions were over the age of 60 and had already retired or were planning to retire. *Abbott I*, 734 F.3d at 415; *Abbott II*, 748 F.3d at 591. In addition, we noted that some physicians felt deterred by the terms of their existing employment or were concerned about private discrimination. *Abbott II*, 748 F.3d at 591, 599.

"a significant number of the reproductive-age female population of Texas will need to travel considerably [farther] in order to" obtain an abortion. *Id.* at 681-82.

Regarding the ASC requirement, the Plaintiffs offered expert testimony that "abortions can be safely performed in office-based settings, such as doctors' offices and specialized clinics," and that "there is no medical basis for requiring facilities in which abortions are performed to meet ASC standards."[17] H.B. 2's severability clause and the fact that many of the ASC standards seem benign and inexpensive, *see, e.g.*, 25 TEX. ADMIN. CODE § 135.52(e)(1)(F) ("A liquid or foam soap dispenser shall be located at each hand washing facility."), Plaintiffs conceded at oral argument that they made no effort to narrow their challenge to any particular standards of the ASC provision of H.B. 2 or its accompanying regulations. Instead, they ask us to invalidate the entire ASC requirement.

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[17] Plaintiffs offered expert testimony that the ASC requirement's construction standards were "largely aimed at maintaining a sterile operating environment," which is not necessary for surgical abortion because "it entails insertion of instruments into the uterus through the vagina, which is naturally colonized by bacteria."Plaintiffs also offered expert testimony that abortion procedures do not necessitate large operating rooms or scrub nurses and circulating nurses, as are required for ASCs. The Plaintiffs' expert also explained that medication abortions do not involve surgery but entail the oral administration of medications; accordingly, the expert concluded that there is "no medical basis for requiring medical abortion to be provided in an ASC."

In opposition, the State offered expert testimony that the sterile environment of an ASC was medically beneficial because surgical abortion involves invasive entry into the uterus, which is sterile. Accordingly, the State's expert opined that abortion procedures should "be performed in an ASC where the higher standard of care is required so as to better protect the patient's health and safety."[18]

Like the Plaintiffs, the district court made no effort to write narrowly, finding that the entirety of the ASC requirement was not medically necessary and that its burdens outweighed any benefits, including that: (1) "women will not obtain better care or experience more frequent positive outcomes at an [ASC] as compared to a previously licensed facility"; (2) "it is unlikely that the stated goal of the requirement—improving women's health—will actually come to pass"; and (3) "the severity of the burden imposed by both requirements is not balanced by the weight of the interests underlying them." *Lakey*, 46 F. Supp. 3d at 684.

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[18] The State's expert explained that other procedures requiring entry into the uterus, such as dilation and curettage, are traditionally performed in an ASC or hospital settings for that reason. The State's expert further explained that ASC requirements as to accountability and monitoring mechanisms ensure patient safety and that other requirements regarding follow up and continuity of care result in patients receiving a higher quality of care.

Regarding the as-applied challenge to the admitting privileges requirement, the State offered expert testimony that this requirement leads to greater continuity of care and "assures peer-review of abortion providers by requiring them to be credentialed and hold admitting privileges at a local hospital, thereby protecting patients from less than qualified providers."[19] Conversely, the Plaintiffs offered testimony that abortion physicians were being denied admitting privileges, not because of their level of competence, but for various other reasons, including: outright denial of admitting privileges with no explanation other than that it "was not based on clinical competence," and having not completed a medical residency even though the bylaws of the hospital did not require such. As with the ASC requirement, the district court ultimately found the admitting privileges requirement was not medically justifiable and that the burdens it imposed were not outweighed by any potential health benefits. *See id.* at 684-85.

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[19] The State's expert opined that the physician performing the abortion "is the most knowledgeable about the procedure and the patient," whereas an emergency room "physician has no prior relationship with the abortion patient and is unfamiliar with her medical history and personal preferences." Thus, it was the State's expert's opinion that the admitting privileges requirement would lead to greater continuity of care, increased quality of care, and fewer risks from complications. *See also Abbott II*, 748 F.3d at 595 ("Requiring abortion providers to have admitting privileges would also promote the continuity of care in all cases, reducing the risk of injury caused by miscommunication and misdiagnosis when a patient is transferred from one health care provider to another.").

The State appeals the entry of declaratory and injunctive relief. Plaintiffs cross-appeal the dismissal of their equal-protection and unlawful-delegation claims and the district court's failure to hold the ASC requirement unconstitutional as applied to future abortion providers. As part of its appeal, the State sought a stay of the district court's order pending resolution of the appeal, and a motions panel of this court stayed in part the district court's injunction. *See Whole Woman's Health v. Lakey*, 769 F.3d 285, 305 (5th Cir.), *vacated in part*, 135 S. Ct. 399 (2014). In turn, the Supreme Court modified this court's order pending full consideration of the appeal and maintained the status quo by continuing the district court's injunction of the ASC requirement as well as the district court's injunction of the admitting privileges requirement as applied to the McAllen and El Paso facilities. *See Whole Woman's Health v. Lakey*, 135 S. Ct. 399 (2014).[20]

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[20] In its reply brief, the State argues for the first time that there is no longer an Article III case or controversy concerning the El Paso clinic because it has not yet reopened in light of the district court's injunction and the Supreme Court continuing that injunction pending appeal. We conclude that this issue is not moot as the State suggests. The El Paso abortion facility was no longer able to provide abortions after April 2014 because its physician, Dr. Richter, no longer had admitting privileges at a local hospital. The Plaintiffs returned the facility's license because they could not afford to pay its annual assessment fees while it was not generating revenue. The facility has not immediately resumed providing services because, during the four months that it was closed, it had to close its doors, lay off its

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III. Standard of Review

We review the district court's factual findings for clear error, its legal conclusions *de novo*, and its ultimate decision to enjoin enforcement of H.B. 2 for abuse of discretion. *See Abbott II*, 748 F.3d at 589. In so doing, we are not bound by the determinations of the motions panel, which considered during an abbreviated proceeding whether an emergency stay should be granted. *See Lakey*, 769 F.3d at 305; *Abbott I*, 734 F.3d at 419 (citing *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 704 (5th Cir. 1997)). Further, no guidance can be gleaned from the Supreme Court's vacating portions of the stay without explanation, as we cannot discern the underlying reasoning from the one-paragraph order.

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staff, move its records and equipment into storage, cancel its contracts with vendors, and give up its lease and its license. The president of the organization that ran the facility testified that if it was successful in this lawsuit, it would "seek to reestablish a licensed abortion facility in El Paso." Because the admitting privileges requirement arguably contributed to the closure of the El Paso facility and there is uncontested testimony that the facility will seek to reopen upon a favorable resolution of this case, the parties still have a concrete interest in this controversy such that it is not moot. *See Chafin v. Chafin*, 133 S. Ct. 1017, 1023 (2013) ("As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." (internal quotation marks omitted)).

IV. Admitting Privileges Requirement—Facial Challenge

By facially invalidating the admitting privileges requirement, the district court granted more relief than anyone requested or briefed. *See Lakey*, 46 F. Supp. 3d at 677 ("[T]he two portions of Texas Health and Safety Code, Sections 245.010(a) and 171.0031(a)(1), create an impermissible obstacle *as applied to all women* seeking a previability abortion." (emphasis added)). Not only was it inappropriate for the district court to grant unrequested relief in a constitutional challenge to a state law, *see Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 458 (5th Cir. 2014) (narrowing a district court's apparent facial relief, which the court held "was an overly broad remedy in an as-applied challenge"), *petition for cert. filed*, S. Ct. No. 14-997 (Feb. 18, 2015), but in so doing, the district court also ran directly afoul of the holding and mandate of *Abbott II*, 748 F.3d at 598-600, and the principle of res judicata. *See Lakey*, 769 F.3d at 293. By granting a broad injunction against the admitting privileges requirement "as applied to all women seeking a previability abortion," the district court resurrected the facial challenge put to rest in *Abbott II*.[21] However much a district court

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[21] The only exception to our disallowing the facial challenge in *Abbott II* was that we did not reverse the district court's injunction with respect to physicians whose application for admitting privileges was still pending at the time H.B. 2 went into effect. *See Abbott II*, 748 F.3d at 605.

may disagree with an appellate court, a district court is not free to disregard the mandate or directly applicable holding of the appellate court. *See United States v. Teel*, 691 F.3d 578, 582-83 (5th Cir. 2012) (describing the law-of-the-case doctrine and mandate rule). We need not spend more time on this well-settled proposition—which plaintiffs do not dispute—and, instead, VACATE this portion of the district court's order.

V. ASC Requirement—Facial Challenge

A. Res Judicata

The State of Texas argues that these Plaintiffs previously challenged H.B. 2 in *Abbott II* without addressing the ASC requirement and, therefore, res judicata bars the current facial challenge.[23] For their part, the Plaintiffs argue that they could not have brought a challenge sooner because they did not know how the statute would be implemented until the implementing regulations went into effect. The district court agreed with Plaintiffs and rejected the State's res judicata defense at the motion to dismiss stage. It also concluded that challenges to the admitting privileges requirement and the ASC requirement represent different claims and causes of action. We reverse.

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[23] Although the State did not raise this argument in its briefing on the emergency stay motion, it did raise the issue in its motion to dismiss before the district court.

Res judicata bars any claims for which: (1) the parties are identical to or in privity with the parties in a previous lawsuit; (2) the previous lawsuit has concluded with a final judgment on the merits; (3) the final judgment was rendered by a court of competent jurisdiction; and (4) the same claim or cause of action was involved in both lawsuits. *Petro-Hunt, L.L.C. v. United States*, 365 F.3d 385, 395 (5th Cir. 2004). The Plaintiffs do not contest the first three elements of the State's res judicata defense, but contend that the "claims" are different. However, res judicata bars even unfiled claims if they arise out of the same transaction and "could have been raised" in the prior litigation. *Allen v. McCurry*, 449 U.S. 90, 94 (1980).

Contrary to the district court's conclusion, the present facial challenge to the ASC requirement and the prior facial challenge to the admitting privileges requirement in *Abbott II* arise from the same "transaction[ ] or series of connected transactions." *Petro-Hunt*, 365 F.3d at 395-96 (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 24(1) (1982)). The challenges involve the same parties and abortion facilities; the challenges are governed by the same legal standards; the provisions at issue were enacted at the same time as part of the same act; the provisions were motivated by a common purpose; the provisions are administered by the same state officials; and the challenges form a convenient trial unit because they rely on a common nucleus of operative facts. *See id.* at 396 (describing the relevant considerations for the fourth prong of the res judicata analysis).

The Plaintiffs' assertion that they could not have previously challenged the ASC requirement because they did not know how it would be implemented until the regulations were set forth is disingenuous, particularly in this litigation. As Plaintiffs admitted at oral argument, they challenge H.B. 2 broadly, with no effort whatsoever to parse out specific aspects of the ASC requirement that they find onerous or otherwise infirm. H.B. 2 very clearly required facilities that perform abortions to meet the existing requirements for ASCs, which were spelled out well before the effective date of this provision and, more importantly, well before the date of the *Abbott II* lawsuit: "On and after September 1, 2014, *the minimum standards for an abortion facility must be equivalent to the minimum standards adopted under Section 243.010 for ambulatory surgical centers.*" TEX. HEALTH & SAFETY CODE ANN. § 245.010(a) (emphasis added). The law does not allow several bites at the same apple, even if from a different quadrant of the apple. *See Southmark Corp. v. Coopers & Lybrand* (*In re Southmark*), 163 F.3d 925, 934 (5th Cir. 1999) ("[*R*]*es judicata* [] bars the litigation of claims that either have been litigated or should have been raised in an earlier suit."); David P. Currie, *Res Judicata: The Neglected Defense*, 45 U. CHI. L. REV. 317, 325 (1978) ("[T]o allow a party to advance arguments in a second proceeding that he could have made in a prior proceeding imposes unnecessary costs on both opposing parties and the judicial system."). We do not suggest here that future lawsuits against this provision based upon specific facts arising in the future

would be barred (*i.e.*, as-applied challenges).[23] However, given the broad nature of this litigation, we discern nothing material that evolved between the time H.B. 2 was passed and *Abbott II* was filed, on the one hand, and the time this lawsuit was filed, on the other, that justified dividing the litigation.[24]

Although rather obliquely presented, Plaintiffs may be arguing that the challenge to the ASC requirement would not have been ripe at the time *Abbott II* was filed in the district court. "[T]he ripeness inquiry focuses on whether an injury that has not yet occurred is sufficiently likely to happen to justify judicial intervention." *Pearson v. Holder*, 624 F.3d 682, 684 (5th Cir. 2010) (alteration in original) (internal quotation marks omitted). "To determine if a case is ripe for adjudication, a court must evaluate (1) the fitness of the issues for judicial decision, and (2) the hardship to the parties of withholding court consideration. The fitness and hardship prongs must be balanced. . . ." *Texas v. United States*, 497 F.3d 491, 498 (5th Cir. 2007) (citing *Abbott Labs. v. Gardner*,

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[23] Similarly, we conclude, *infra*, that the district court correctly ruled that res judicata does not bar the as-applied challenges here.

[24] Plaintiffs argue that they did not know whether existing facilities would be "grandfathered." Nothing in the language of the legislation allows "grandfathering" of existing abortion facilities. Existing ASC facilities were already "grandfathered." In any event, this argument would at most support only a challenge to the lack of "grandfathering," not the broad-based challenge actually filed and the broad relief granted.

387 U.S. 136, 149 (1967)). "A court should dismiss a case for lack of 'ripeness' when the case is abstract or hypothetical. . . A case is generally ripe if any remaining questions are purely legal ones; conversely, a case is not ripe if further factual development is required." *Orix Credit Alliance, Inc. v. Wolfe*, 212 F.3d 891, 895 (5th Cir. 2000).

Resolution of whether the ASC requirement is facially unconstitutional did not need to await promulgation of regulations that simply carried out the unambiguous mandate of H.B. 2. *Cf. Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201 (1983) ("The question of pre-emption is predominantly legal, and although it would be useful to have the benefit of California's interpretation . , resolution of the pre-emption issue need not await that development."). This is especially true because H.B. 2's precise and mandatory language did not leave the Department of State Health Services discretion as to the standards that would apply to abortion facilities. *Cf. Sch. Dist. of Pontiac v. Sec'y of U.S. Dep't of Educ.*, 584 F.3d 253, 262 (6th Cir. 2009) (en banc) (reasoning that the action did not depend on decisions made by state authorities, who did not have the discretion to change the impact of the law at issue). Instead, it is abundantly clear from H.B. 2 that all abortion facilities must meet the standards already promulgated for ASCs. This inevitable application of the ASC standards to abortion facilities supports deciding its constitutionality prior to the promulgation of implementing

regulations. *See Pearson*, 624 F.3d at 684 ("'Where the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect.'" (quoting *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 143 (1974))); *Fla. State Conference of NAACP v. Browning*, 522 F.3d 1153, 1164 (11th Cir. 2008). Indeed, for these reasons, at the time of *Abbott II*, a facial challenge to the ASC requirement would not have been "abstract or hypothetical." *Orix*, 212 F.3d at 895 (citation omitted). Importantly, Plaintiffs made no effort to parse the regulations or otherwise assert anything material in the district court or on appeal with respect to the facial challenge that was not known the day H.B. 2 passed. The district court's broad-brush striking of the entire statute also reflects nothing that needed to await further developments following H.B. 2's enactment.

In addition to the fitness prong, the hardship-to-the-parties analysis supports the conclusion that this issue should have been resolved at the time of *Abbott II*. It would have been in the interest of the non-ASC abortion facilities to know at the earliest possible time whether H.B. 2 was unconstitutional or whether they were required to begin making modifications or buying or renting space to comply with the ASC requirement. *See Pac. Gas & Elec. Co.*, 461 U.S. at 201-02. It would have imposed a hardship on abortion facilities to require them to bring this challenge only

after final agency regulations were promulgated, forcing them to either begin compliance measures or risk facing only a brief period to comply if the ASC requirement was ultimately upheld upon later challenge. *See id.* Furthermore, trying this facial challenge separately from the two facial challenges brought in *Abbott II* imposed a hardship on the State by requiring it to defend H.B. 2 against constitutional challenge in a piecemeal and duplicative fashion. Accordingly, we conclude that the district court erred in its ruling on the res judicata defense to this facial challenge to the ASC requirement.

B. Merits

Even if our conclusion as to res judicata is incorrect, the facial challenge to the ASC requirement fails on the merits as well. Thus, for the purpose of completeness, we address the facial challenge, assuming *arguendo* that res judicata does not bar the challenge.

1. Rational Basis

The stated purpose of H.B. 2 was to raise the standard and quality of care for women seeking abortions and to protect the health and welfare of women seeking abortions. *See* Senate Comm. on Health & Human Servs., Bill Analysis, Tex. H.B. 2, 83d Leg., 2d C.S. 1, 2 (2013). Relying on *Abbott II*, the district court concluded that both the admitting privileges and ASC requirements were rationally related to a legitimate state interest. We agree:

Abbott II held that the admitting privileges requirement is supported by a rational basis, 748 F.3d at 593-96, and in this case, the State supported the medical basis for both requirements with evidence at trial. *See Lakey*, 769 F.3d at 294.[25] Plaintiffs do not argue differently and, instead, focus their attack on whether the challenged provision has "the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Casey*, 505 U.S. at 877

2. Purpose Prong

Texas's stated purpose for enacting H.B. 2 was to provide the highest quality of care to women seeking abortions and to protect the health and welfare of women seeking abortions.[26] There is no question that

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[25] *See also Simopoulos*, 462 U.S. at 519 (concluding that Virginia's outpatient-surgical-hospital requirement for second trimester abortion was "not an unreasonable means of furthering the State's compelling interest in 'protecting the woman's own health and safety'" (quoting *Roe*, 410 U.S. at 150)); *Roe*, 410 U.S. at 163 ("Examples of permissible state [health regulations] are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like.").

[26] *See* Senate Comm. on Health & Human Servs., Bill Analysis, Tex. H.B. 2, 83d Leg., 2d C.S. 1 (2013) ("H.B. 2 seeks to increase the health and safety of a woman who chooses to have an abortion by requiring a physician performing or inducing an abortion to have admitting privileges at a hospital and to

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this is a legitimate purpose that supports regulating physicians and the facilities in which they perform abortions.[27] The district court found that this was not the real purpose of the law and instead concluded "that the ambulatory-surgical-center requirement was intended to close existing licensed abortion clinics." *Lakey*, 46 F. Supp. 3d at 685.

The district court first found an impermissible purpose from the fact that the implementing regulations did not provide licensed abortion facilities a grandfathering exception to the standards applicable to ASCs, even though a grandfathering provision applied to existing ASCs—what it described as "disparate and arbitrary treatment." *Id.* The State argues that the district court misunderstood the application of the ASC grandfathering provision because it applies to all ASCs—including ASCs that currently provide abortions—such that they do not have to comply with new construction requirements as the ASC standards are modified. *See* 25 TEX. ADMIN. CODE

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provide certain information to the woman."); *id.* at 2 ("Moving abortion clinics under the guidelines for ambulatory surgical centers will provide Texas women choosing abortion the highest standard of health care.").

[27] *See Roe*, 410 U.S. at 150 ("The State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient. This interest obviously extends at least to the performing physician and his staff, to the facilities involved, to the availability of after-care, and to adequate provision for any complication or emergency that might arise.").

§ 135.51(a). In this regard, the State correctly points out that ASCs that provide abortions are treated no differently than any other ASC. *See Lakey*, 769 F.3d at 294. Even assuming *arguendo* there is some "disparate treatment," the lack of a grandfathering provision is simply evidence that the State truly intends that women only receive an abortion in facilities that can provide the highest quality of care and safety—the stated legitimate purpose of H.B. 2. Another consideration is that the impact of a lack of grandfathering is lessened by the legislature allowing nearly fourteen months for existing abortion facilities to comply. *See* TEX. HEALTH & SAFETY CODE ANN. § 245.010(a) (September 1, 2014, effective date).[28] In addition, because there are 433 ASCs in Texas, the legislature logically could have inferred that abortion providers could easily rent space at existing ASCs. The district court's inferences from the mere fact of the law itself are thus not supported.

The district court further found an impermissible purpose likely due to "the dearth of credible evidence supporting the proposition that abortions performed in ambulatory surgical centers have better patient health outcomes compared to clinics licensed under the previous regime." *Lakey*, 46 F. Supp. 3d at 685.[29]

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[28] Further, the Plaintiffs do not argue that it is impossible for abortion providers to comply with the ASC requirement, only costly and difficult.

[29] The district court also inferred an impermissible purpose from the State's attorneys arguing that women in El Paso would

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The district court erred in its conclusion. In *Mazurek*, the Supreme Court rejected the argument that the law at issue "must have had an invalid purpose because all health evidence contradicts the claim that there is any health basis for the law." 520 U.S. at 973 (internal quotation marks omitted). Likewise, in *Gonzales*, the Court explained that legislatures have "wide discretion to pass legislation in areas where there is medical and scientific uncertainty" and that medical uncertainty, as the record demonstrates is present here, does not lead to the conclusion that a law is unconstitutional. 550 U.S. at 163.

The Plaintiffs also argue that an impermissible purpose can be inferred from the effect of the law—the closure of a majority of abortion facilities in Texas. This argument is foreclosed by *Mazurek*, in which the Supreme Court explained that courts "do not assume unconstitutional legislative intent even when statutes produce harmful results." 520 U.S. at 972; *see Lakey*, 769 F.3d at 295 (citing *Mazurek*, 520 U.S. at 972); *cf. Casey*, 505 U.S. at 874 ("The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it.").

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not face an undue burden because they could simply travel to New Mexico, a state without a requirement that abortions be performed in an ASC. We agree with the State that an improper legislative purpose cannot be inferred from an argument raised by its lawyers more than a year after H.B. 2 was enacted.

Plaintiffs bore the burden of proving that H.B. 2 was enacted with an improper purpose. *See Abbott II*, 748 F.3d at 597. They failed to proffer competent evidence contradicting the legislature's statement of a legitimate purpose for H.B. 2. *See Mazurek*, 520 U.S. at 972 (noting that there must be "*some* evidence" of improper purpose); *see also Abbott II*, 748 F.3d at 597; *Lakey*, 769 F.3d at 294-95 (stating that the district court cited no record evidence of improper purpose). All of the evidence referred to by the district court is purely anecdotal and does little to impugn the State's legitimate reasons for the Act. Plaintiffs failed to prove that H.B. 2 "serve[s] no purpose other than to make abortions more difficult." *Casey*, 505 U.S. at 901.

3. Effect Prong

Facial challenges relying on the effects of a law "impose a heavy burden upon the parties maintaining the suit." *Gonzales*, 550 U.S. at 167 (internal quotation marks omitted). In the abortion context, it is unclear whether a facial challenge requires showing that the law is invalid in all applications (the general test applied in other circumstances) or only in a large fraction of the cases in which the law is relevant (the test applied in *Casey*). *See id.*; *Abbott II*, 748 F.3d at 588-89. In both *Gonzales* and *Abbott II*, the challenged provisions were upheld because even the less deferential, large-fraction test was not satisfied. *See Gonzales*, 550 U.S. at 167-68; *Abbott II*, 748 F.3d at 600. Here, the district court facially invalidated both

the admitting privileges and ASC requirements without so much as mentioning either test. Instead, it based its holding on a finding that the two requirements worked together, along with other state requirements, to "effectively reduce or eliminate meaningful access to safe abortion care for a *significant, but ultimately unknowable, number of women* throughout Texas." *Lakey*, 46 F. Supp. 3d at 686 (emphasis added). This analysis runs afoul of *Casey*, *Gonzales*, and *Abbott II*, which require, at a minimum, a "large fraction." *Lakey*, 769 F.3d at 296 (quoting *Abbott II*, 748 F.3d at 600); *see also Gonzales*, 550 U.S. at 167-68; *Casey*, 505 U.S. at 895.[30]

As support for its holding that H.B. 2's admitting privileges and ASC requirements constituted an undue burden, the district court also weighed the burdens and medical efficacy of these two requirements. *Lakey*, 46 F. Supp. 3d at 684 ("[T]he severity of the burden imposed by both requirements is not balanced by the weight of the interests underlying them."). In so doing, the district court concluded that H.B. 2 would not further the State's interests in

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[30] Plaintiffs cite the use of the phrase "significant number" in *Casey* as support for the district court's approach. *See, e.g.*, 505 U.S. at 893-94 ("The spousal notification requirement is thus likely to prevent a significant number of women from obtaining an abortion."). However, in *Casey*, unlike here, the Court went on to find that this significant number amounted to "a large fraction." *Id.* at 895.

maternal health and increased quality of care.[81] defense of this approach, Plaintiffs argue that the two requirements at issue are unconstitutional unless they are shown to actually further the State's legitimate interests. We disagree with the Plaintiffs and the district court's approach.

In *Abbott II*, the district court similarly held that the admitting privileges requirement "does nothing to further" the State's interest in maternal health, although it performed this analysis as part of the rational basis inquiry. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 951 F. Supp. 2d 891, 900 (W.D. Tex. 2013). In *Abbott II*, we held that the inquiry was "wrong on several grounds" and explained that "the fundamental question is whether Planned Parenthood has met its burden to prove that the admitting privileges regulation imposes an undue burden on a woman's ability to choose an abortion." 748 F.3d at 590. *Abbott II* thus disavowed the inquiry employed by the district court:

> It is not the courts' duty to second guess legislative factfinding, improve on, or cleanse the legislative process by allowing relitigation of

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[81] *See Lakey*, 46 F. Supp. 3d at 684 ("[W]omen will not obtain better care or experience more frequent positive outcomes at an [ASC] as compared to a previously licensed facility."); *id.* ("[I]t is unlikely that the stated goal of the [ASC] requirement—improving women's health—will actually come to pass."); *id.* ("The court finds no particularized health risks arising from abortions performed in nonambulatory-surgical-center clinics which countenance the imposition of the [ASC] requirement. ").

> the facts that led to the passage of a law. Under rational basis review, courts must presume that the law in question is valid and sustain it so long as the law is rationally related to a legitimate state interest. As the Supreme Court has often stressed, the rational basis test seeks only to determine whether any conceivable rationale exists for an enactment. Because the determination does not lend itself to an evidentiary inquiry in court, the state is not required to prove that the objective of the law would be fulfilled.

748 F.3d at 594 (citations and internal quotation marks omitted).[32] In addition, in *Gonzales*, in the course of applying the effect portion of the undue-burden

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[32] As they did in *Abbott II*, Plaintiffs again argue that *Akron I* and *Barnes* require the more demanding approach employed by the district court. *Compare* Pls.' Br. 35-38 (citing, *inter alia*, *Akron I*, 462 U.S. at 430-31, and *Barnes v. Mississippi*, 992 F.2d 1335, 1339 (5th Cir. 1993)), *with* Brief of Plaintiffs-Appellees at 15-17, *Abbott II*, 748 F.3d 583 (No. 13-51008) (same). As we explained in *Abbott II*, *Casey* overruled major portions of *Akron I* and replaced *Akron's* strict scrutiny test with the undue burden analysis. *See* 748 F.3d at 590 (citing *Casey*, 505 U.S. at 871). In *Barnes*, we described *Casey* as holding that "the constitutionality of an abortion regulation turns on an examination of the *importance* of the state's interests in the regulation and the severity of the burden that regulation imposes on a woman's right to seek an abortion." 992 F.2d at 1339 (emphasis added). *Barnes* nevertheless examined the state's interest without considering the extent to which the challenged law furthered that interest and without conducting a balancing test. *See id.* at 1339-40; *Lakey*, 769 F.3d at 298.

inquiry, the Court made clear that medical uncertainty underlying a statute is for resolution by legislatures, not the courts. *See* 550 U.S. at 163 ("The Court has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty."); *id.* at 164 ("Medical uncertainty does not foreclose the exercise of legislative power in the abortion context any more than it does in other contexts."); *id.* at 166 ("Considerations of marginal safety, including the balance of risks, are within the legislative competence when the regulation is rational and in pursuit of legitimate ends."). Thus, we conclude that the district court erred by substituting its own judgment for that of the legislature, albeit this time in the name of the undue burden inquiry. *See Lakey*, 769 F.3d at 297 ("Under our precedent, we have no authority by which to turn rational basis into strict scrutiny under the guise of the undue burden inquiry.").[33]

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[33] Plaintiffs filed a Rule 28(j) letter referencing the recent district court opinion in *Planned Parenthood of Wis., Inc. v. Van Hollen*, No. 3:13-cv-465, 2015 U.S. Dist. LEXIS 35389 (W.D. Wis. Mar. 20, 2015). This case follows the standards announced in *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 2841 (2014), which requires balancing the burdens imposed by a law against its medical benefits, and which we distinguished in *Abbott II*, 748 F.3d at 596. "In our circuit, we do not balance the wisdom or effectiveness of a law against the burdens the law imposes." *Lakey*, 769 F.3d at 297 (citing *Abbott II*, 748 F.3d at 593-94); *accord Women's Med. Prof'l Corp. v. Baird*, 438 F.3d 595, 604-09 (6th Cir. 2006); *Greenville Women's Clinic v. Bryant*, 222 F.3d

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Turning to the direct application of the large fraction test to the facts of this case, the parties' arguments focused on the number of women who faced increased travel distances due to the closure of abortion facilities. In particular, the arguments centered around those women who would face travel distances (one-way) of over 150 miles in light of *Abbott II*'s holding that "an increase of travel of less than 150 miles for some women is not an undue burden under *Casey*." 748 F.3d at 598. The district court credited the testimony of the Plaintiffs' expert, Dr. Grossman, and found that: (1) after the admitting privileges requirement went into effect, approximately

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157, 170-72 (4th Cir. 2000); *Women's Health Center of W. Cnty., Inc. v. Webster*, 871 F.2d 1377, 1380-81 (8th Cir. 1989). Even if some balancing were appropriate, we are unsure that the Seventh Circuit's balancing test—pursuant to which even a slight or *de minimis* burden could be "undue"—is faithful to *Casey*, which requires a *substantial* obstacle. *See Planned Parenthood of Wis. v. Doyle*, 162 F.3d 463, 478 (7th Cir. 1998) (Manion, J., dissenting) ("To fail the undue burden test, the alternatives to the [outlawed procedure] must present a substantial obstacle to a woman obtaining an abortion [but] [t]here is no suggestion in the court's opinion that the risks are more than "*de minimis*."); *see also Casey*, 505 U.S. at 926 (Blackmun, J., dissenting in part) ("Our precedents and the joint opinion's principles require us to subject all non-*de-minimis* abortion regulations to strict scrutiny."); *cf. Goss v. Lopez*, 419 U.S. 565, 576 (1975) (noting that procedural due process analysis only applies when a deprivation is more than *de minimis*). In any event, and although we do not reach the issue here, we note that applying any balancing test would be difficult on this record because plaintiffs have not introduced evidence from which we could discern the number or fraction of reproductive-age women who would be burdened, unduly or otherwise.

400,000 women of reproductive age would face travel distances of more than 150 miles; and (2) once both the admitting privileges and ASC requirements went into effect, approximately 900,000 women of reproductive age would face travel distances of more than 150 miles. *See Lakey*, 46 F. Supp. 3d at 681-82.

Although Dr. Grossman and the district court did not mention percentages or fractions, using the district court's finding that there were approximately 5.4 million women of reproductive age in Texas, *see id.* at 681, the following percentages and fractions are derived: (1) 7.4% or 1/13 of women of reproductive age faced travel distances of 150 miles or more after the admitting privileges requirement went into effect; and (2) 16.7% or 1/6 of women of reproductive age would face travel distances of 150 miles or more after both requirements went into effect.

The motions panel majority found that these numbers did not satisfy the large fraction test:

> Even assuming, *arguendo*, that 150 miles is the relevant cut-off, this is nowhere near a "large fraction." *See Abbott II*, 748 F.3d at 600. As discussed above, the *Casey* plurality, in using the "large fraction" nomenclature, departed from the general standard for facial challenges. The general standard for facial challenges allows courts to facially invalidate a statute only if "no possible application of the challenged law would be constitutional." *Abbott II*, 748 F.3d at 588. In other words, the law must be unconstitutional in 100% of

> its applications. We decline to interpret *Casey* as changing the threshold for facial challenges from 100% to 17%.

769 F.3d at 298; *see also Abbott II*, 748 F.3d at 598 (holding that 10% did not amount to a large fraction). We agree and adopt this reasoning.

In defense of the district court's judgment, the Plaintiffs hardly argue that these numbers amount to a large fraction. Instead, they try to shift the discussion to making the denominator not all women of reproductive age in Texas, but "the population of women for whom the law imposes a meaningful burden." They fail to specify what that number would be or how it might be derived. In addition, the Plaintiffs' approach would appear to "make the large fraction test merely a tautology, always resulting in a large fraction. The denominator would be women that Plaintiffs claim are unduly burdened by the statute, and the numerator would be the same." *Lakey*, 769 F.3d at 299. In *Casey*, the Court explained that the denominator was the group of women to whom the law was "relevant" or a "restriction." 505 U.S. at 894-95. Because H.B. 2 applies to all abortion providers and facilities in Texas, and the Plaintiffs argued that abortion clinics all across the state would likely be required to close, we used all women of reproductive age or women who might seek an abortion as the denominator in *Lakey*, *Abbott II*, and *Abbott I*. *See Lakey*, 769 F.3d at 299 ("Here, the ambulatory surgical center requirement applies to every abortion clinic in the State, limiting the options for all women in

Texas who seek an abortion. The appropriate denominator thus includes all women affected by these limited options."); *Abbott II*, 748 F.3d at 598, 600; *Abbott I*, 734 F.3d at 414. Plaintiff's new denominator is inconsistent with our binding decision in *Abbott II*.

In reaching its conclusion that H.B. 2's requirements imposed an undue burden on a significant number of women, the district court also found that travel distances combined with the following practical concerns to create a *de facto* barrier to abortion for some women: "lack of availability of child care, unreliability of transportation, unavailability of appointments at abortion facilities, unavailability of time off from work, immigration status and inability to pass border checkpoints, poverty level, the time and expense involved in traveling long distances, and other, inarticulable psychological obstacles." *Lakey*, 46 F. Supp. 3d at 683. On this point, we agree with the motions panel majority: "We do not doubt that women in poverty face greater difficulties. However, to sustain a facial challenge, the Supreme Court and this circuit require Plaintiffs to establish that the law itself imposes an undue burden on at least a large fraction of women. Plaintiffs have not done so here." *Lakey*, 769 F.3d at 299; *see Abbott I*, 734 F.3d at 415 (holding that "obstacle[s]" that are "unrelated to the hospital-admitting-privileges requirement" are irrelevant to the undue-burden inquiry in a facial challenge); *cf. McRae*, 448 U.S. at 316 ("The financial constraints that restrict an indigent woman's ability to enjoy the full range of constitutionally protected

freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency."); *Maher*, 432 U.S. at 474 (reasoning that "[t]he indigency that may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions is neither created nor in any way affected by the" state's regulation). Moreover, even accepting the district court's finding on this point, it is not clear from the record what fraction of women face an undue burden due to this combination of practical concerns and the effects of H.B. 2. *Cf. Casey*, 505 U.S. at 887 (noting, based on similar factual findings, that "[a] particular burden is not of necessity a substantial obstacle").

Finally, in reaching its holding, the district court also accepted the finding of Dr. Grossman that the ASCs providing abortions in Texas "will not be able to go from providing approximately 14,000 abortions annually, as they currently are, to providing the 60,000 to 70,000 abortions that are done each year in Texas once all of the non-ASC clinics are forced to close." As the motions panel majority observed, Dr. Grossman's opinion "is *ipse dixit* and the record lacks any actual evidence regarding the current or future capacity of the eight clinics." *Lakey*, 769 F.3d at 300.[34]

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[34] Dr. Grossman based his opinion on a chain of unsupported inferences. *See Lakey*, 769 F.3d at 300. First, he found that in cities with both ASC and non-ASC abortion facilities, some non-ASC facilities provided more abortions while some ASCs provided fewer abortions. From the increased amount of abortions at some of the non-ASC facilities, Dr. Grossman concluded that

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Further, as the motions panel majority recognized, there does not appear to be any evidence in the record that the current ASCs are operating at full capacity or that they cannot increase capacity. *See id.* Thus, the district court's determination on this point is unsupported by evidence and, therefore, is clearly erroneous. *See id.*

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there was an increased demand for abortions in that city. Conversely, Dr. Grossman found the decrease in the amount of abortions at some ASCs to be "likely indicative of their inability to increase capacity in the face of growing demand." Dr. Grossman ultimately concluded that this purported inability to increase capacity at ASCs "may be a result of the admitting privileges requirement."

There were similar problems with Plaintiffs' evidence in *Abbott II*. As we noted in *Lakey*:

> [A]n expert who was part of the same research team as Dr. Grossman offered similarly unsupported conjecture [in *Abbott II*] when predicting that, as a result of the *admitting privileges requirement*, approximately 22,000 women in Texas would be unable to obtain abortions. On cross-examination in [*Lakey*], Dr. Grossman admitted that his colleague's earlier predictions proved to be inaccurate. Dr. Grossman testified in [*Lakey*] that there had been a decrease of only 9,200 abortions and that the decrease could not be wholly ascribed to the admitting privileges requirement. Indeed, Dr. Grossman acknowledged on cross-examination that in his team's published, peer-reviewed article, the researchers qualified their findings by noting that they "cannot prove causality between the State restrictions and falling abortion rate."

769 F.3d at 300 n.16.

Because the Plaintiffs failed to prove that the ASC requirement imposes an undue burden on a large fraction of women for whom it is relevant, we conclude that the district court erred in striking down the ASC requirement as a whole as facially invalid. *See Gonzales*, 550 U.S. at 167-68; *Abbott II*, 748 F.3d at 588-89, 598-600.[35]

C. ASC Requirement and the Provision of Medication Abortion

In addition to challenging the ASC requirement as facially unconstitutional, Plaintiffs challenged the ASC requirement as unconstitutional statewide in the context of the provision of medication abortion (in which drugs, as opposed to surgical procedures, are used to induce an abortion). On this claim, the district court concluded that the ASC requirement was invalid "specifically as applied to the provision of medication abortions," with the entirety of the district court's analysis being that in this context "any medical justification for the requirement is at its absolute weakest in comparison with the heavy burden it imposes." *Lakey*, 46 F. Supp. 3d at 686. The State appeals this portion of the district court's judgment, pointing out that the district court's conclusion is

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[35] Given our holding, we also reject the Plaintiffs' argument on cross-appeal that the district court erred by excepting from its facial injunction of the ASC requirement "abortion providers that seek to become licensed in the future."

improperly based solely on its belief that the law is medically unjustified.

The Plaintiffs do not respond with any arguments on appeal in support of this portion of the judgment. For the same reasons that we hold the district court erred in facially invalidating the ASC requirement, we conclude that the record and district court's opinion do not justify statewide invalidation of the ASC requirement in the context of medication abortions: (1) res judicata bars this claim, as it arises out of the same transaction as the claims in *Abbott II* and it "could have been raised" in *Abbott II*, *Allen*, 449 U.S. at 94; and (2) the ASC requirement in the context of medication abortion is rationally related to a legitimate state interest and has not been shown to have an improper purpose or impose an undue burden on a large fraction of women for whom it is relevant, *Gonzales*, 550 U.S. at 167-68.

VI. As-Applied Challenges

In *Abbott II*, we rejected the facial challenge to the admitting privileges requirement but noted that an as-applied challenge to the Rio Grande Valley (which is comprised of Starr, Hidalgo, Willacy, and Cameron County, hereinafter collectively, "Rio Grande Valley")[38] may be appropriate based upon the

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[38] Plaintiffs' expert, Dr. Grossman, used the term "Lower Rio Grande Valley" to describe the area comprising the following four counties: Starr, Hidalgo, Willacy, and Cameron. *See also*

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evidence presented in that case. *See Abbott II*, 748 F.3d at 589 ("Later as-applied challenges can always deal with subsequent, concrete constitutional issues."). Plaintiffs have thus asserted such an as-applied challenge related to a facility in McAllen, as well to a facility in El Paso that was not previously discussed.

A. Res Judicata for As-Applied Challenges

The State makes the same res judicata arguments as to these challenges as it does for the facial challenge. The res judicata analysis is different, however, when we address the as-applied challenges because, as we suggested in *Abbott II*, the actual factual development may be different than anticipated in a facial challenge setting. We now know with certainty that the non-ASC abortion facilities have actually closed and physicians have been unable to obtain admitting privileges after diligent effort. Thus, the actual impact of the combined effect of the admitting privileges and ASC requirements on abortion facilities, abortion physicians, and women in Texas can be more concretely understood and measured. *See Hernandez v. City of Lafayette*, 699 F.2d 734, 737 (5th Cir. 1983) (addressing whether the changes are "significant" and create "new legal conditions" (internal quotation marks omitted)).

Abbott II, 748 F.3d at 597 ("The Rio Grande Valley has four counties.").

Our sister circuits have confronted the issue of how the ripeness analysis (a subsidiary consideration in the res judicata analysis discussed above) differs between a facial challenge and an as-applied challenge. The Eleventh Circuit has explained:

> Because the question of ripeness depends on the timing of the adjudication of a particular issue, it applies differently to facial and as-applied challenges. A facial challenge asserts that a law *always* operates unconstitutionally. In the context of a facial challenge, a purely legal claim is presumptively ripe for judicial review because it does not require a developed factual record. An as-applied challenge, by contrast, addresses whether a statute is unconstitutional on the facts of a particular case or to a particular party. Because such a challenge asserts that a statute cannot be constitutionally applied in particular circumstances, it necessarily requires the development of a factual record for the court to consider.

Harris v. Mexican Specialty Foods, Inc., 564 F.3d 1301, 1308 (11th Cir. 2009) (citations and internal quotation marks omitted). The First Circuit has explained this approach as well:

> [A] challenge to a rule or statute may be ripe for adjudication on the question of facial constitutionality and yet not be ripe for adjudication on the question of constitutionality as applied. *See, e.g.*, *Grayned v. City of Rockford*, 408 U.S. 104, 121 & n.50 (1972) (upholding

> noise control ordinance but reserving decision on constitutionality of possible applications); *Times Film Corp. v. City of Chicago*, 365 U.S. 43 (1961) (upholding ordinance requiring licensing of films prior to public exhibition) *and Teitel Film Corp. v. Cusack*, 390 U.S. 139 (1968) (invalidating same ordinance as applied); *Adler v. Board of Education*, 342 U.S. 485 (1952) (upholding New York statutory scheme for identifying and removing subversive school teachers) *and Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (invalidating portions of same statutory scheme as applied).

Kines v. Day, 754 F.2d 28, 31 (1st Cir. 1985). Other courts have concluded that an as-applied challenge was not ripe although a facial challenge was ripe. *See* 13B CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3532.3 (3d ed.1998) ("A number of other cases in more general settings reflect similar distinctions between the ripeness of broad attacks on the legitimacy of any regulation and the nonripeness of more particular attacks on more specific applications."); *see, e.g.*, *Richmond Med. Ctr. for Women v. Herring*, 570 F.3d 165, 180 (4th Cir. 2009) (en banc); *Sam & Ali, Inc. v. Ohio Dep't of Liquor Control*, 158 F.3d 397, 398-400 (6th Cir. 1998); *Hotel Emps. & Rest. Emps. Int'l Union v. Nev. Gaming Comm'n*, 984 F.2d 1507, 1512-13 (9th Cir. 1993).

Although we agree with the State that some aspects of the as-applied challenge were extant at the time the *Abbott II* litigation was filed, some important

facts occurred later, such as the actual closure of abortion facilities in Corpus Christi and El Paso and the physicians ultimately being denied admitting privileges after diligent effort. *Cf. Orix*, 212 F.3d at 895 ("[A] case is not ripe if further factual development is required." (citation omitted)). We disclaimed reliance on such facts in *Abbott II*, 748 F.3d at 589 ("Later as-applied challenges can always deal with subsequent, concrete constitutional issues."); *id.* at 599 n. 14 ("To the extent that the State and Planned Parenthood rely on developments since the conclusion of the bench trial and during this appeal, we do not consider any arguments based on those facts. "). Although Plaintiffs could have foreseen (and did foresee) some of these closures and admitting privilege rejections, the State suggested that we could not know these matters with certainty at the time, and we deferred consideration of these facts to a time when they were more concretely presented. That time arrived, and the district court correctly held it was not precluded from addressing the actual facts in the as-applied context. Thus, although it is a close question, we conclude that the district court did not err in denying relief to the State on this defense as to the McAllen and El Paso as-applied challenges.

B. McAllen

Whole Woman's Health operates a licensed abortion facility in McAllen that is not an ASC and which resides on a lot that the Plaintiffs' expert, George W. Johannes, testified would not allow for

expansion to meet the ASC construction standards. Testimony showed that four physicians[37] of Whole Woman's Health unsuccessfully sought admitting privileges from hospitals within thirty miles of the clinic, with one of the hospitals notifying them that the denial of admitting privileges "was not based on clinical competence." Whole Woman's Health has been unsuccessful in recruiting physicians with admitting privileges to work at the McAllen facility. It contends, then, that the ASC and admitting privileges requirements will prevent it from providing abortions. The McAllen clinic ceased providing abortions on November 1, 2013.

While women in the Rio Grande Valley could previously travel 150 miles or less to Corpus Christi to obtain an abortion, *see Abbott II*, 748 F.3d at 597-98, the abortion facility in Corpus Christi has now closed. The State argues that women in the Rio Grande Valley continue to be able to obtain abortions in San Antonio and Houston, where the abortion facilities now nearest to them are located. Indeed, Plaintiffs' expert, Dr. Grossman, concluded that fifty percent of the women from the Rio Grande Valley were previously obtaining abortions somewhere other than Corpus Christi, even before that clinic closed. Nonetheless, the closure of the Corpus Christi clinic means that all women in the Rio Grande Valley will

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[37] Of those four, only Dr. Lynn is a party to the case. The other three were neither named as parties nor identified in the district court; their names were redacted from exhibits.

have to travel approximately 235 miles[38] to San Antonio or farther to obtain an abortion. In addition, the president and CEO of Whole Woman's Health, Amy Hagstrom Miller, and a certified community health worker, Lucila Ceballos Felix, testified regarding the difficulties that women in the Rio Grande Valley faced after the McAllen facility ceased performing abortions, including that the clinic saw an increase in self-attempted abortion and some women indicated they would be unable to make the trip from McAllen to San Antonio or Houston to obtain an abortion.[39]

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[38] The record reflects that the distance between McAllen, which is located near the center of the Rio Grande Valley, and the center of San Antonio is approximately 235 miles. The distance between McAllen and the ASC-compliant clinic in San Antonio, based on the address information in the parties' Joint Stipulation to Facts, is 234 miles.

[39] While some of Hagstrom Miller's testimony, and that of Ceballos Felix, appears to be hearsay (or even double hearsay in the case of the interviews by other employees of the clinic), the record is unclear whether the State objected on these grounds. Moreover, the district court relied on Hagstrom Miller's and Ceballos Felix's entire testimony for its findings that women in the Rio Grande Valley faced "practical concerns" and the State did not challenge these findings as clear error. We conclude that the district court's findings are not clearly erroneous. *See Abbott II*, 748 F.3d at 589 (noting the standard); *Reich v. Lancaster*, 55 F.3d 1034, 1045 (5th Cir. 1995) ("The trial judge's unique perspective to evaluate the witnesses and to consider the entire context of the evidence must be respected." (internal quotation marks omitted)).

In *Abbott II*, relying on *Casey*, we held that having to travel 150 miles from the Rio Grande Valley to Corpus Christi to obtain an abortion was not an undue burden for purposes of the facial challenge raised there and that "*Casey* counsels against striking down a statute solely because women may have to travel long distances to obtain abortions." 748 F.3d at 598. *Casey* permitted even farther distances than 150 miles because it involved a 24-hour waiting period and women in 62 of Pennsylvania's 67 counties were required to travel for one to more than three hours one way to obtain an abortion. *See Lakey*, 769 F.3d at 303 (citing *Abbott II*, 748 F.3d at 598).[40]

We recognize that any statement of "how far is too far" will involve some imprecision. *Casey* suggested that three hours (one way) was not too far.[41]

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[40] Texas has a 24-hour waiting period, but the waiting period is reduced to 2 hours for women who certify that they live "100 miles or more from the nearest [licensed] abortion provider." *See* TEX. HEALTH & SAFETY CODE ANN. § 171.012(a)(4) (West Supp. 2014).

[41] *Casey* even suggested that doubling what amounted to a six-hour round trip was not an undue burden. 505 U.S. at 887 ("[T]he District Court did not conclude that the waiting period is [a substantial] obstacle even for the women who are most burdened by it. Hence, on the record before us we are not convinced that the 24-hour waiting period constitutes an undue burden."). The district court in *Casey* noted that the waiting period doubled travel distances for some women who were more than three hours (one-way) from the nearest clinic. *Planned Parenthood of Se. Pa. v. Casey*, 744 F. Supp. 1323, 1352 (E.D. Pa. 1990), *aff'd in part, rev'd in part*, 947 F.2d 682 (3d Cir. 1991), *aff'd in part, rev'd in part*, 505 U.S. 833 (1992). *See also Abbott*

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Abbott II held that 150 miles is not too far and concluded that *Casey* suggested that no distance, standing alone, could be too far. 748 F.3d at 598. We hold that, in the specific context of this as-applied challenge as to the McAllen facility, the 235-mile distance presented, *combined with* the district court's findings,[42] are sufficient to show that H.B. 2 has the "effect of placing a substantial obstacle in the path of a woman seeking an abortion." *Casey*, 505 U.S. at 877 Therefore, we hold that the district court did not err in enjoining the ASC requirement "as applied" to the McAllen facility. However, we conclude that the injunction was overbroad as it fails to recognize that the Corpus Christi facility (or one like it) could reopen in the future. Thus, we modify the injunction to apply to the McAllen facility until such time as another licensed abortion facility becomes available to provide abortions at a location nearer to the Rio Grande Valley than San Antonio.

II, 748 F.3d at 598, which cited the district court's opinion in *Casey* and noted the distances involved.

[42] *See supra* note 39 and accompanying text. We note that our resolution of this as-applied challenge does not depend on the testimony of Plaintiffs' expert, Dr. Grossman (or any related findings by the district court), as to the percentage of women in Texas driving more than 150 miles or the capacity of abortion facilities to handle any changes in, or reallocation of, demand. As we noted earlier, Dr. Grossman's testimony on the capacity of remaining ASC abortion facilities is *ipse dixit*, and the record lacks evidence on this subject. *See supra* note 34 and accompanying text.

"We also must consider the proper place of H.B. 2's comprehensive and careful severability provision. . . ." *Abbott II*, 748 F.3d at 589 (citing *Leavitt v. Jane L.*, 518 U.S. 137, 138-39 (1996)). H.B. 2's severability provision directs that "every provision, section, subsection, sentence, clause, phrase, or word" is severable and that it is the intention of the legislature that only those portions of the act or regulations that impose an undue burden be invalidated, with all others left in place. H.B. 2, § 10(b). The implementing regulations include similar language. *See* 25 TEX. ADMIN. CODE § 139.9. It is thus necessary to "sever [H.B. 2 and the implementing regulations'] problematic portions while leaving the remainder intact." *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 329 (2006). The Plaintiffs have been careful to avoid identifying which specific portions of the ASC standards contribute to the closure of abortion facilities, and the district court did not sever out only the problematic portions. We are thus forced to perform this analysis without the benefit of their input.

The regulatory standards for ASCs fall into three categories: (1) operating requirements, 25 TEX. ADMIN. CODE §§ 135.4-.17, 135.26-.27; (2) requirements related to fire prevention, general safety, and handling of hazardous materials, *id.* §§ 135.41-.43; and (3) physical-plant requirements, *id.* §§ 135.51-.56. The Plaintiffs put forth expert testimony that abortion facilities could not meet the ASC standards because they would be required to modify their existing buildings to meet the physical-plant requirements, corresponding to §§ 135.51-.56, and the

fire-prevention requirements, corresponding to § 135.41.[43] the same manner, the district court's

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[43] The parties stipulated that the McAllen clinic did not comply with the ASC requirement, but did not stipulate as to the feasibility of Whole Woman's Health operating an ASC-compliant facility in the future. The parties also did not stipulate whether other ASC-compliant clinics might open in the Rio Grande Valley.

The parties offered conflicting expert testimony regarding whether Whole Woman's Health could renovate its current facility. Plaintiffs' expert, George W. Johannes, inspected several of Plaintiffs' facilities to determine how the ASC requirement would affect their operations. He testified that none of Plaintiffs' clinics, including the one in McAllen, were built on a large enough footprint to accommodate an ASC-compliant facility. Moreover, he testified that only three of the clinics had sufficient land to expand their footprints. McAllen was not one of those three. Johannes estimated that the cost of expanding these clinics ranged from $1.7 million to $2.6 million. He testified that to build a new ASC-compliant facility would cost $3.4 million, not including the price of land. His testimony reflects that Whole Woman's Health could not expand the McAllen facility, but would have to relocate either by obtaining new land and constructing a $3.4 million dollar facility, or leasing an existing ASC-compliant facility at a different location. Hagstrom Miller similarly testified that Whole Woman's Health in McAllen could not comply with the ASC requirement.

The state agreed that it would be expensive for Whole Woman's Health to acquire or build an ASC-compliant facility, but nevertheless argued that doing so would be feasible. The State's expert, Deborah Kitz, testified that the McAllen clinic could reduce its costs by running more efficiently and reducing the management fee it pays to Whole Woman's Health, which she testified was significantly above the average rate. The State's expert also disagreed with Plaintiffs' expert, testifying that the McAllen facility already had sufficient space to renovate into an ASC-compliant facility and would not even need to relocate.

(Continued on following page)

findings with respect to the prohibitive effects of the ASC requirement focused on the structural modifications or new buildings that would be required by these standards. While the Plaintiffs also complained of the nursing requirements at § 135.15(a), we are not aware of any record evidence that complying with the nursing requirements would cause the closure of abortion facilities. The Plaintiffs admitted that the remaining operational requirements were comparable to the standards with which abortion facilities were already required to comply. Therefore, we conclude that the district court erred by not constraining its injunction to only those regulations that create an undue burden, namely, § 135.51-.56 (physical plant) and § 135.41 (fire prevention). *See Lakey*, 769 F.3d at 304. We modify the injunction as to McAllen to enjoin only the enforcement of the ASC physical-plant and fire-prevention standards, as described more fully below. *See* §§ 135.41, 135.51-.56.

With respect to the admitting privileges requirement, Whole Woman's Health presented considerable

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The district court determined that the Plaintiffs' expert was more credible, finding that the cost of complying with the ASC requirement was upwards of $1.5 million for clinics that could renovate their existing facilities, and over $3 million for those that had to acquire land and construct a new facility. It determined that the McAllen clinic was an "[e]xisting clinic[ ], unable to meet the financial burdens imposed by the new regulatory regime, and w[ould] close as a result." On appeal, the State did not challenge these findings as clear error. Accordingly, we accept the district court's findings with respect to the prohibitive costs of upgrading or relocating the McAllen clinic.

evidence that Plaintiff Dr. Lynn and three unidentified physicians working at the McAllen facility were unable to obtain admitting privileges at local hospitals for reasons other than their competence. Plaintiffs also presented evidence that they were unsuccessful in recruiting physicians to work at the McAllen facility who had admitting privileges at a local hospital. Accordingly, we conclude that the district court's injunction of the admitting privileges requirement as applied to the McAllen facility when utilizing Dr. Lynn at that specific facility should be upheld, as described more fully below.

To sum up, we affirm in part and modify in part the district court's injunction of the admitting privileges and ASC requirements as applied to McAllen, as follows: (1) The State of Texas is enjoined from enforcing § 135.51-.56 and § 135.41 of the ASC regulations against the Whole Woman's Health abortion facility located at 802 South Main Street, McAllen, Texas, when that facility is used to provide abortions to women residing in the Rio Grande Valley (as defined above), until such time as another licensed abortion facility becomes available to provide abortions at a location nearer to the Rio Grande Valley than San Antonio; (2) The State of Texas is enjoined from enforcing the admitting privileges requirement against Dr. Lynn when he provides abortions at the Whole Woman's Health abortion facility located at 802 South Main Street, McAllen, Texas, to women residing in the Rio Grande Valley. The remainder of the injunction as to the McAllen facility is vacated.

C. El Paso Abortion Facility

Reproductive Services operates a licensed abortion facility in El Paso that is not an ASC. The physician at this facility, Dr. Richter, applied for admitting privileges at three hospitals but was only able to obtain temporary privileges at one hospital. These privileges were later revoked.[44] Services has been unsuccessful in recruiting physicians with admitting privileges to work at the El Paso facility. After Dr. Richter's temporary admitting privileges were revoked in April 2014, the El Paso facility stopped providing abortions and eventually closed. The closest Texas abortion facility that will remain open is in San Antonio, over 550 miles away. There is an abortion facility approximately twelve miles away in Santa Teresa, New Mexico. Prior to H.B. 2, more than half of the women who obtained abortions at the Santa Teresa facility were from El Paso.

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[44] Plaintiffs state that the hospital denied Dr. Richter admitting privileges because she was an abortion provider. As emphasized in *Abbott II*, Texas and federal law prohibit discrimination on this basis and Texas provides a private cause of action to challenge such discrimination. *See* 748 F.3d at 598 & n.13 (citing TEX. OCC. CODE ANN. §§ 103.002(b), 103.003, and 42 U.S.C. § 300a-7(c)). This undermines the argument that the admitting privileges requirement is the *cause* of the closure of the facility since the suggestion is that the cause is actually unlawful discrimination for which state law provides Dr. Richter a remedy. However, because we conclude that the closure of the El Paso facility, whatever its cause, does not create an undue burden on a woman's right to choose an abortion, we need not address this issue further.

The State argues the closure of the El Paso abortion facility will not impose an undue burden because women in this area can travel to the Santa Teresa facility. The Plaintiffs contend that this argument is precluded by *Jackson Women's Health Organization v. Currier*, 760 F.3d 448, 457-58 (5th Cir. 2014), *petition for cert. filed*, S. Ct. No. 14-997 (Feb. 18, 2015), where we held that a statute that would have the effect of closing the only abortion facility in the state could not be upheld based upon evidence of facilities in other states. In that case, although Mississippi's admitting privileges requirement for abortion physicians was shown to cause the closure of the only abortion clinic in the state, women could travel to abortion facilities outside the state. *Id.* at 451, 455. The State argues that *Jackson* is distinguishable because, unlike in Mississippi, H.B. 2 will not cause the closure of all abortion facilities in Texas. The Plaintiffs did not respond to this argument in their merits briefs. The motions panel acknowledged *Jackson* and noted that "the situation in Texas is markedly different from that in Mississippi" because H.B. 2 would not close the last clinic in the state. *Lakey*, 769 F.3d at 304. However, the motions panel declined "to construe [*Jackson*'s] broad language so narrowly in [an] emergency stay proceeding." *Id.* As discussed above, a motions panel proceeding is an abbreviated one; having now considered the matter in full, we conclude that *Jackson* is distinguishable.

In *Jackson*, we relied on *State of Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938), an equal

protection case in which the University of Missouri denied admission to Gaines because he was African-American and offered him a stipend to attend school in an adjacent state. We explained that "*Gaines* simply and plainly holds that a state cannot lean on its sovereign neighbors to provide protection of its citizens' federal constitutional rights." 760 F.3d at 457. In this case, unlike in *Gaines* and *Jackson*, the State has not completely shunted its responsibility onto other states. H.B. 2 does not result in the closure of all abortion providers in the state: at least eight ASCs will continue to provide abortions in Texas. *See Lakey*, 769 F.3d at 304 ("Given the panel's reliance on *Gaines*, the panel may have meant to apply its limitation only to states where all the abortion clinics would close."). In addition, the principle relied on by *Jackson* has little traction in this as-applied challenge because prior to H.B. 2, half of the patients at the Santa Teresa clinic came from El Paso, which is in the same cross-border metropolitan area as Santa Teresa.[45] This demonstrates that Texas women regularly *choose to have an abortion in New Mexico* independent of the actions of the State. Given these facts particular and peculiar to El Paso, it would ignore reality in this as-applied challenge to "focus[ ] solely

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[45] We note that this analysis would likely be different in the context of an international border, and we disclaim any suggestion that the analysis here applies to a city across an international border from a United States city in question.

on the effects within the regulating state," as we did in *Jackson*. 760 F.3d at 457.

Unlike the city of Jackson, Mississippi, which is 175-200 miles from the borders of Tennessee and Louisiana, the evidence in this case shows that El Paso and Santa Teresa are part of the same metropolitan area, though separated by a state line, and that people regularly go between the two cities for commerce, work, and medical care. No such situation was presented by the evidence or considered by the panel in *Jackson*. Taking the Plaintiffs' version of *Jackson*, a clinic just over the line in Texarkana, Arkansas, would not be a fact that could be considered by a court in Texarkana, Texas. An injunction is an equitable remedy, and it would be wholly inequitable to ignore the reality of metropolitan areas that straddle state lines and in which people regularly travel back and forth in commerce. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311-12 (1982) (explaining that "an injunction is an equitable remedy," which does not "issue[] as of course or to restrain an act the injurious consequences of which are merely trifling" (citation and internal quotation marks omitted)). To the extent that *Jackson* can be read to so provide, it is dicta as that situation was simply not presented in that case.

Therefore, although the nearest abortion facility in Texas is 550 miles away from El Paso, there is evidence that women in El Paso can travel the short distance to Santa Teresa to obtain an abortion and, indeed, the evidence is that many did just that before

H.B. 2. Accordingly, because H.B. 2 does not place a substantial obstacle in path of those women seeking an abortion in the El Paso area, we hold that the district court erred in sustaining Plaintiffs' as-applied challenge in El Paso.

VII. Plaintiffs' Cross-Appeal

The Plaintiffs appeal the district court's dismissal of their equal protection and unlawful delegation claims. For substantially the same reasons as the district court stated in its order dismissing these claims, we affirm the judgment of the district court on these claims.

Accordingly, the district court's judgment is AFFIRMED in part, MODIFIED in part, VACATED in part, and REVERSED in part.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14-50928

WHOLE WOMAN'S HEALTH; AUSTIN WOMEN'S HEALTH CENTER; KILLEEN WOMEN'S HEALTH CENTER; NOVA HEALTH SYSTEMS, doing business as Reproductive Services; SHERWOOD C. LYNN, JR., M.D., on behalf of themselves and their patients; PAMELA J. RICHTER, D.O., on behalf of themselves and their patients; LENDOL L. DAVIS, M.D., on behalf of themselves and their patients,

Plaintiffs-Appellees-Cross-Appellants

v.

KIRK COLE, M.D., Commissioner of the Texas Department of State Health Services, in his Official Capacity; MARI ROBINSON, Executive Director of the Texas Medical Board, in her Official Capacity,

Defendants-Appellants-Cross-Appellees

Appeals from the United States District Court
for the Western District of Texas, Austin

(Filed Jun. 19, 2015)

Before PRADO, ELROD, and HAYNES, Circuit Judges.

ORDER:

On June 9, 2015, we issued an opinion in *Whole Woman's Health v. Cole*, No. 14-50928, 2015 U.S. App. LEXIS 9699 (5th Cir. Jun. 9, 2015). We now MODIFY our opinion and judgment of June 9, 2015 to provide that the district court's injunction of the ASC requirement (as defined in the June 9 opinion) as applied to the McAllen facility shall remain in effect until October 29, 2015, at which time the injunction shall be vacated in part, as delineated and explained in our June 9 opinion.

The unopposed Motion to Become an Amicus Party and to File Amicus Brief, filed June 15, 2015, is GRANTED.

The opposed Appellees' Motion to Stay the Mandate, filed June 10, 2015, is DENIED. Judge Prado respectfully dissents from the denial of the motion to stay.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14-50928

WHOLE WOMAN'S HEALTH; AUSTIN WOMEN'S HEALTH CENTER; KILLEEN WOMEN'S HEALTH CENTER; NOVA HEALTH SYSTEMS, doing business as Reproductive Services; SHERWOOD C. LYNN, JR., M.D., on behalf of themselves and their patients; PAMELA J. RICHTER, D.O., on behalf of themselves and their patients; LENDOL L. DAVIS, M.D., on behalf of themselves and their patients,

Plaintiffs-Appellees-Cross-Appellants.

v.

DAVID LAKEY, M.D., Commissioner of the Texas Department of State Health Services, in his Official Capacity; MARI ROBINSON, Executive Director of the Texas Medical Board, in her Official Capacity,

Defendants-Appellants-Cross-Appellees.

Appeals from the United States District Court for the Western District of Texas

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(Filed Oct. 2, 2014)

Before SMITH, ELROD, and HIGGINSON, Circuit Judges.

JENNIFER WALKER ELROD, Circuit Judge:

Plaintiffs[1] filed this lawsuit seeking declaratory relief and permanent injunctions against the enforcement of two recent amendments to Texas's laws pertaining to the performing of abortions. *See* 2013

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[1] Plaintiffs in this lawsuit are some of the abortion providers in Texas: Whole Woman's Health; Austin Women's Health Center; Killeen Women's Health Center; Nova Health Systems d/b/a Reproductive Services; and Sherwood C. Lynn, Jr., M.D., Pamela J. Richter, D.O., and Lendol L. Davis, M.D., on behalf of themselves and their patients.

Plaintiffs largely overlap with the plaintiffs in a previous challenge to H.B. 2. *See Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 951 F. Supp. 2d 891 (W.D. Tex. 2013). Whole Woman's Health, Austin Women's Health Center, Killeen Women's Health Center, and Dr. Richter all were plaintiffs in the prior lawsuit. Doctors Lynn and Davis were not parties to the earlier proceeding, but Whole Woman's Health and Austin Women's Health Center, respectively, sued on their behalf in *Abbott*. *See* Complaint ¶¶ 13-14, *Abbott*, No. 1:13-CV-862-LY (stating that clinics were suing "on behalf of" their "physicians"). Reproductive Services was not a plaintiff in *Abbott*, but Dr. Richter, its medical director, was a plaintiff in *Abbott*. *See id.* ¶ 21.

Lamar Robinson, M.D. was a named plaintiff in *Abbott* and was originally a named plaintiff in this case. However, on June 3, 2014, he and former plaintiff Abortion Advantage filed a Notice of Voluntary Dismissal. At oral argument in this case, the parties advised the panel that Dr. Robinson voluntarily dismissed his claims because he obtained admitting privileges at a hospital within thirty miles of the clinic at which he provided abortions. Planned Parenthood, the largest provider of abortion services in Texas, is not a party to this lawsuit, although it was a named plaintiff in *Abbott*.

Texas House Bill No. 2 ("H.B. 2").[2] The lawsuit was filed in April 2014, and the district court conducted a four-day bench trial August 4-7, 2014. Three weeks later, at 4:39 p.m. on August 29, 2014, the last business day before the ambulatory surgical center provision would go into effect, the district court delivered its opinion and issued a final judgment enjoining the admitting privileges requirement and ambulatory surgical center provision of H.B. 2 as to all abortion facilities in Texas. The district court also enjoined other specific applications of H.B. 2. The district court opined that together these requirements "create a brutally effective system of abortion regulation" that is unconstitutional.

Appellants (collectively "the State") appealed to the Fifth Circuit and filed an emergency motion to stay the district court's injunctions pending the resolution of their appeal. Plaintiffs filed a response, the State replied, and we heard oral argument on the motion to stay on September 12, 2014. We GRANT, in part, and DENY, in part, the motion to stay the district court's injunctions pending appeal.

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[2] Act of July 12, 2013, 83rd Leg., 2d C.S., ch. 1, §§ 1-12, 2013 Tex. Sess. Law Serv. 4795-802 (West) (codified at Tex. Health & Safety Code Ann. §§ 171.0031, 171.041-.048, 171.061-.064, & amending §§ 245.010-.011; Tex. Occ. Code Ann. amending §§ 164.052 & 164.055).

I.

On July 12, 2013, the Texas Legislature passed H.B. 2. The proposed legislation for what became H.B. 2 was first filed in the Texas House of Representatives in June 2013. The House considered the bill in two public hearings. After three readings of the bill before the entire House, H.B. 2 passed with a 96-49 vote.[3] The bill was then sent to the Texas Senate, which also held a public hearing and read the bill three times.[4] The Senate engaged in a debate in which a number of senators gave speeches for and against the bill, and ultimately passed H.B. 2 with a final vote of 19-11.[5]

Two of H.B. 2's provisions are at issue here. The first requires any physician performing an abortion to have active admitting privileges at a hospital within thirty miles of the location where the abortion is performed. Tex. Health & Safety Code Ann. § 171.0031. The admitting privileges requirement went into effect on October 31, 2013.[6] The second

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[3] 83rd Leg., Second Called Session, House Journal at 63, 10 Jul. 2013, *available at* http://www.journals.house.state.tx.us/hjrnl/832/pdf/83C2DAY03FINAL.PDF#page=13.

[4] 83rd Leg., Second Called Session, *available at* http://www.legis.state.tx.us/BillLookup/History.aspx?LegSess=832&Bill=HB2.

[5] 83rd Leg., Second Called Session, Senate Journal at 46, 12 Jul. 2013, *available at* http://www.journals.senate.state.tx.us/sjrnl/832/pdf/83S207-12-F.PDF#page=2.

[6] The admitting privileges requirement was originally scheduled to take effect on October 29, 2013, but the district court enjoined the requirement on October 28, 2013. *See Planned*

(Continued on following page)

provision requires that all abortion clinics existing on or after September 1, 2014, comply with the same minimum standards required of ambulatory surgical centers. Tex. Health & Safety Code Ann. § 245.010.[7] The regulatory standards for ambulatory surgical centers contain two main categories: (1) physical plant, which includes architectural, electrical, plumbing, and HVAC requirements, *see* 25 Tex. Admin. Code §§ 135.51-.56, and (2) operations, which includes requirements for medical records systems, training, staffing, and cleanliness, *see* 25 Tex. Admin. Code §§ 135.4-.17, 135.26-.27.

We are familiar with legal challenges to H.B. 2. In 2013, the district court enjoined enforcement of H.B. 2's admitting privileges requirement and medication abortion provision, and the State challenged the injunction on appeal. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 951

Parenthood of Greater Tex. Surgical Health Servs. v. Abbott (*Abbott I*), 734 F.3d 406, 409-10 (5th Cir. 2013). We stayed the district court's injunction as to the admitting privileges requirement on October 31, 2013, thus reinstating the admitting privileges requirement except as to "abortion providers who applied for admitting privileges within the grace period allowed under H.B. 2, but [were] awaiting a response from a hospital." *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott* (*Abbott II*), 748 F.3d 583, 600 (5th Cir. 2014).

[7] These standards are codified at Tex. Health & Safety Code § 243.010. Given H.B. 2's enactment date, July 12, 2013, clinics had fourteen months within which to comply with these standards before the ambulatory surgical center provision became effective.

F. Supp. 2d 891, 909 (W.D. Tex. 2013). In that case, we granted in part[5] the State's emergency motion to stay the permanent injunction, *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott* (*Abbott I*), 734 F.3d 406, 419 (5th Cir. 2013), and later upheld both the admitting privileges requirement and the medication abortion provision as facially constitutional. *Planned Parenthood of Greater Texas Surgical Health Servs. v. Abbott* (*Abbott II*), 748 F.3d 583, 605 (5th Cir. 2014).

In the instant lawsuit, Plaintiffs challenge the admitting privileges requirement, this time not on its face, but as applied to two specific clinics. Whole Woman's Health and Dr. Sherwood C. Lynn, Jr. challenge the requirement as applied to the clinic operated by Whole Woman's Health in McAllen. Nova Health Systems and Dr. Pamela J. Richter challenge the requirement as applied to the clinic operated by Reproductive Services in El Paso. Plaintiffs also challenge the ambulatory surgical center provision as unconstitutional on its face, and as applied to the clinics

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[5] We granted a stay of the district court's determination that the admitting privileges requirement was facially invalid. We denied a request for a stay of the district court's decision to create a health exception to the medication abortion provision. In denying the stay of the medication abortion provision, we noted that "we do not prejudge the outcome of these issues on appeal. We conclude only that a stay of the injunction on these grounds pending appeal is not appropriate." *Abbott I*, 734 F.3d at 418. Indeed, at the merits stage, we concluded that the statute regulating medication abortions did not facially require a court-imposed exception. *Abbott II*, 748 F.3d at 600-04.

in McAllen and El Paso, and as applied to medication abortion.

The district court's judgment extended beyond Plaintiffs' claims and the relief requested.[9] Not only did the district court enjoin the admitting privileges requirement as applied to the McAllen and El Paso clinics, as Plaintiffs sought, the district court determined that the admitting privileges requirement "create[d] an impermissible obstacle *as applied to all women* seeking a previability abortion." *Whole Woman's Health v. Lakey*, No. 1:14-CV-284-LY, 2014 WL 4346480 at *2 (W.D. Tex. Aug. 29, 2014) (hereinafter [*Whole Woman's Health Judgment*] (emphasis added)); *see also Whole Woman's Health v. Lakey*, No. 1:14-CV-284-LY, slip op. at 4 (W.D. Tex. Aug. 29, 2014) (The two requirements "operate together to place an unconstitutional undue burden on women throughout Texas.").

As to the ambulatory surgical center provision, the district court's opinion and final judgment are unclear. The final judgment declares that the ambulatory surgical center provision is unconstitutional "as to all abortion facilities in the State" with two exceptions: (1) facilities already licensed and meeting the minimum standards; and (2) all future abortion facilities commencing operation after the effective

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[9] Moreover, the district court's ruling contravened *Abbott II*, which had already upheld the admitting privileges requirement as facially constitutional.

date. *Whole Woman's Health Judgment*, at *1. Confusingly, the judgment further declares that the ambulatory surgical center provision is unconstitutional and that when considered together with the admitting privileges requirement, "create[s] an impermissible obstacle as applied to all women seeking a previability abortion." *Id.* at *2. In their briefs and at oral argument, the parties expressed uncertainty as to whether the district court intended to invalidate this provision on its face or, according to the earlier language, as applied to some clinics in the state.

It is also unclear whether the district court specifically determined that the provision is unconstitutional as applied to the McAllen and El Paso clinics. While Plaintiffs made these as-applied challenges, the district court did not directly address them in either the declarations section of its final judgment or the conclusion of its opinion.[10] However, the district court indicated in the introductory parts of its opinion and judgment that it intended to do so. *See Whole Woman's Health Judgment*, at *1 ("[T]he ambulatory-surgical-center requirements of House Bill 2 as applied to [the] clinic[s] in McAllen [and] El Paso are unconstitutional"); *Whole Woman's*

[10] A similar issue arose in the *Abbott* case, when the district court issued a judgment broader in scope than the determinations in its opinion. *Abbott I*, 734 F.3d at 410 ("The final judgment enjoined the medication abortions provision to a greater extent than the court had indicated it would in its Memorandum Opinion."). In that case, we narrowed the injunction in the judgment. *Id.* at 419.

Health, slip op. at 4 (declaring that the ambulatory surgical center provision, "as applied to the McAllen and El Paso clinics, place[s] an unconstitutional undue burden on women"); *id.* at 16 (stating that the requirement, "as applied to the Rio Grande Valley and El Paso clinics, [is] constitutionally impermissible"); *see also id.* at 19 ("In all other applications, the court finds that the ambulatory-surgical-center requirement imposes an undue burden on Texas women of reproductive age."). We note that the broad judgment "as applied to all women" logically would include the McAllen and El Paso clinics, even though the district court did not specifically address in its conclusions and judgment Plaintiffs' as-applied claims for these locations.

To alleviate confusion and to fairly address the State's emergency motion and Plaintiffs' response, we consider whether to stay injunctions of both the admitting privileges requirement and the ambulatory surgical center provision on their face—or in the district court's words, "as applied to all women in Texas"—and as applied to the McAllen and El Paso clinics. In addition, we will address the injunction of the ambulatory surgical center provision as applied to medication abortions. *See Whole Woman's Health Judgment* at *2.

II.

"Factual findings by the district court are typically reviewed for clear error." *City of Alexandria v.*

Brown, 740 F.3d 339, 352 (5th Cir. 2014). The district court found, after trial with witness credibility determinations, that Texas had over forty abortion clinics prior to the enactment of H.B. 2, and that after the ambulatory surgical center provision takes effect, only seven or eight clinics will remain, representing more than an 80% reduction in clinics statewide in nearly fourteen months, with a 100% reduction in clinics west and south of San Antonio. The district court further found that there was no credible evidence of medical or health benefit associated with the ambulatory surgical center provision in the abortion context.

The district court also found: (1) the construction costs of bringing existing clinics into compliance with the minimum standards for ambulatory surgical centers "will undisputedly approach 1 million dollars and will most likely exceed 1.5 million dollars"; (2) "the cost of acquiring land and constructing a new compliant clinic will likely exceed three million dollars" for existing clinics that cannot comply due to physical space limitations; (3) the enforcement of both challenged H.B. 2 provisions will increase women's travel distances to clinics; for example, 1.3 million women of reproductive age in Texas will live more than 100 miles from a clinic, 900,000 women will live more than 150 miles from a clinic, 750,000 women will live more than 200 miles from a clinic, and some women will live as far as 500 miles from a clinic; (4) the burdens of increased travel combine with "practical concerns includ[ing] lack of availability of child care, unreliability of transportation, unavailability of

appointments at abortion facilities, unavailability of time off from work, immigration status and inability to pass border checkpoints, poverty level, [and] the time and expense involved in traveling long distances"; and (5) the remaining seven or eight clinics likely will not have the capacity to perform 60,000-72,000 abortions per year in Texas.

III.

We consider four factors in deciding whether to grant a stay pending appeal:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Abbott I, 734 F.3d at 410 (quoting *Nken v. Holder*, 556 U.S. 418, 425-26 (2009)). A stay "is not a matter of right, even if irreparable injury might otherwise result to the appellant." *Nken*, 556 U.S. at 427

The State initially filed a motion to stay in this court and, shortly thereafter, filed the same motion with the district court. The district court denied the motion "for substantially the reasons stated in its memorandum opinion." Plaintiffs do not object to the order in which the State filed its motions and agree that the present motion is properly before us. *See Abbott I*, 734 F.3d at 410.

IV.

"Before viability, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy." *Gonzales v. Carhart*, 550 U.S. 124, 146 (2007) (internal quotation marks omitted). Nor may a State "impose upon this right an undue burden, which exists if a regulation's purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Id.* (internal quotation marks omitted); *see also Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992). To determine the constitutionality of a state law, we ask "whether the Act, measured by its text in this facial attack, imposes a substantial obstacle to previability[ ] abortions." *Carhart*, 550 U.S. at 156.

Following *Carhart* and *Casey*, our circuit conducts a two-step approach, first applying a rational basis test, then independently determining if the burden on a woman's choice is undue. *See Abbott II*, 748 F.3d at 593-94, 597 ("Even though the state articulated a rational basis for the law . [Plaintiff] could succeed if the effect of the law substantially burdened women's access to abortion in Texas."); *see also Carhart*, 550 U.S. at 158 ("Where it has a rational basis to act, and it does not impose an undue burden, the State may use its regulatory power in furtherance of its legitimate interests. . . .").

A.

Though Plaintiffs sought only as-applied relief from the admitting privileges requirement, limited to two abortion clinics—one in El Paso and one in McAllen—the district court, in its final judgment, appears to have facially invalidated the admitting privileges requirement throughout Texas. *See Whole Woman's Health Judgment* at *2 ("[T]he two portions of Texas Health and Safety Code, Sections 245.010(a) [ambulatory surgical center provision] and 171.0031(a)(1) [admitting privileges requirement], create an impermissible obstacle *as applied to all* women seeking a previability abortion.") (emphasis added); *see also Whole Woman's Health*, slip op. at 21 (noting that the admitting privileges requirement and ambulatory surgical center provision are unconstitutional as to *all women in the state* seeking a previability abortion because they "act together to create an undue burden on a woman seeking a previability abortion by restricting access to previously available legal facilities"). This was inappropriate because Plaintiffs did not request that relief. *See Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 458 (5th Cir. 2014) (narrowing the district court's injunction to correspond with the scope of the plaintiffs' requested relief). Furthermore, the district court's facial invalidation of the admitting privileges requirement is directly contrary to this circuit's precedent. *Abbott II* specifically upheld the facial constitutionality of the admitting privileges requirement. 748 F.3d at 599-600.

B.

We now turn to the central question presented by this emergency motion: whether the State has shown a likelihood of success regarding whether the ambulatory surgical center provision is unconstitutional on its face. We conclude that it has.

As explained in *Abbott II*, if the State establishes that a law is rationally related to a legitimate state interest, we do not second guess the legislature regarding the law's wisdom or effectiveness. 748 F.3d at 594. Nor is the State "required to prove that the objective of the law would be fulfilled." *Id.* (internal quotation marks omitted).

The district court concluded that H.B. 2, including both provisions at issue here, "surmount[ed] the low bar of rational-basis review." *Whole Woman's Health*, slip op. at 6. We agree with the district court's conclusion that the ambulatory surgical center provision satisfies rational basis review. In addition, no party challenges the district court's conclusion.

Thus, our review will focus on the second step of this circuit's approach; namely, whether this provision imposes an undue burden. The undue burden inquiry looks to whether the challenged provision has either "the *purpose* or *effect* of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Casey*, 505 U.S. at 877 (emphasis added). If it does, it is unconstitutional. *Id.*

1.

We begin with the purpose inquiry. "[P]laintiffs bore the burden of attacking the State's purpose here," and the State has shown a strong likelihood that Plaintiffs failed to meet that burden. *Abbott II*, 748 F.3d at 597; *see also Abbott I*, 734 F.3d at 413.

The district court determined that "the ambulatory-surgical-center requirement was intended to close existing licensed abortion clinics." *Whole Woman's Health*, slip op. at 16. To support its conclusion, the district court determined that H.B. 2 treats abortion facilities in a "disparate and arbitrary" manner by not including an exception to the ambulatory surgical center provision for previously licensed abortion providers. According to the district court, "other types of ambulatory-surgical facilities are frequently granted waivers or are grandfathered due to construction dates that predate the newer construction requirements." *Id.* at 10 (citing 25 Tex. Admin. Code § 135.51(a)).

The State argues that the district court misunderstood the relevant provision in the governing Texas regulation. As the State reads the provision, H.B. 2 does not treat abortion facilities disparately from other ambulatory surgical centers in this respect. *See* 25 Tex. Admin. Code § 135.51(a). According to the State, there is no ambulatory surgical center exemption for any facility within the statutorily-defined subset requiring licensure, regardless of whether it provides abortions. The provision cited

by the district court provides an exemption to *any* facility previously licensed as an ambulatory surgical center that failed to comply with new building code requirements amended in June 2009. Any such facility, regardless of whether it provides abortions, qualifies for the exemption. Based on our review of the relevant provision, we agree with the State that ambulatory surgical centers providing abortions are not treated differently from other ambulatory surgical centers.

Besides its view of the above regulation, the district court cited no record evidence to support its determination that the ambulatory surgical center provision was enacted for the purpose of imposing an undue burden on women seeking abortions, nor did it make any factual finding regarding an improper purpose. The Texas Legislature's stated purpose was to improve patient safety. *See, e.g.*, Senate Comm. On Health & Human Servs., Bill Analysis, Tex. H.B. 2, 83d Leg., 2d C.S. 1-2 (2013) ("H.B. 2 seeks to increase the health and safety" of abortion patients and to provide them with "the highest standard of health care"). As we observed in *Abbott I*, the State of Texas has an "interest in protecting the health of women who undergo abortion procedures." 734 F.3d at 413; *see also Carhart*, 550 U.S. at 157 ("There can be no doubt the government has an interest in protecting the integrity and ethics of the medical profession." (internal quotation marks omitted)). Courts are not permitted to second guess a legislature's stated purposes absent clear and compelling evidence

to the contrary. *See Kansas v. Hendricks*, 521 U.S. 346, 361 (1997) ("[W]e ordinarily defer to the legislature's stated intent."); *Flemming v. Nestor*, 363 U.S. 603, 617 (1960) ("[O]nly the clearest proof could suffice to establish the unconstitutionality of a statute on [the] ground of [improper legislative motive]."). Such evidence simply does not appear in the record here.

Alternatively, the district court opined that it was "not required" to find actual evidence of improper purpose because H.B. 2's ambulatory surgical center provision has the *effect* of creating an undue burden. *Whole Woman's Health*, slip op. at 16. To the extent the district court found an improper purpose based on the law's *effect*, the State is likely to succeed on the merits. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (noting that the purpose and effect of undue burden are two different inquiries and there must be "*some* evidence of that improper purpose"); *Abbott II*, 748 F.3d at 597 ("[T]he plaintiffs offered no evidence implying that the State enacted the admitting privileges provision in order to limit abortions. . There is thus no basis for a finding of impermissible purpose under *Casey*.").

2.

We now evaluate whether the State has shown a likelihood of success on the merits of whether the ambulatory surgical center provision "has the *effect* of imposing an unconstitutional burden" sufficient to

justify a facial invalidation. *Carhart*, 550 U.S. at 161 (emphasis added). The State has made such a showing.

Facial challenges relying on the effects of a law "impose[ ] a heavy burden upon the part[y] maintaining the suit." *Abbott I*, 734 F.3d at 414 (second alteration in original) (quoting *Carhart*, 550 U.S. at 167) (internal quotation marks omitted); *Abbott II*, 748 F.3d at 604 (same). In *Carhart*, the Supreme Court recognized the existence of divergent views as to "[w]hat that burden consists of in the specific context of abortion statutes. . " 550 U.S. at 167. It is well-settled in this circuit that "[a] facial challenge will succeed only where the plaintiff shows that there is no set of circumstances under which the statute would be constitutional." *Barnes v. Mississippi*, 992 F.2d 1335, 1342 (5th Cir. 1993); *see also Abbott II*, 748 F.3d at 588 ("Standard principles of constitutional adjudication require courts to engage in facial invalidation only if no possible application of the challenged law would be constitutional."). The Supreme Court uses the same "no set of circumstances" rule in general for facial challenges. *See United States v. Salerno*, 481 U.S. 739, 745 (1987). However, as we noted in *Abbott II*, it is not clear whether the Supreme Court applies this general rule in abortion cases. 748 F.3d at 588.

In *Casey*, the controlling plurality held that an abortion-regulating statute would fail constitutional muster if, "in a *large fraction of the cases* in which it is relevant, it will operate as a substantial obstacle to

a woman's choice to undergo an abortion." 505 U.S. at 895 (emphasis added). In earlier abortion cases, the Court used the "no set of circumstances" approach. *See, e.g.*, *Rust v. Sullivan*, 500 U.S. 173, 183 (1991); *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 514 (1990). The more recent *Carhart* majority did not choose between "no set of circumstances" and "large fraction," but instead upheld the statute in question on the basis that the facial challenge could not satisfy either standard. 550 U.S. at 167-68 ("We need not resolve that debate." *Id.* at 1670.). We will do the same here, as we did in *Abbott I* and *Abbott II*, and "apply the 'large fraction' nomenclature for the sake of argument only, without casting doubt on the general rule." *Abbott II*, 748 F.3d at 588-89; *see also Abbott I*, 734 F.3d at 414.

The ambulatory surgical center provision applies to all clinics performing abortions. Every woman in Texas who seeks an abortion will be affected to some degree by this requirement because it effectively narrows her options for where to obtain an abortion. As the parties stipulated at trial, six licensed ambulatory surgical centers "will not be prevented by the ambulatory surgical center [provision] of HB 2 from performing abortions." These are located in Austin, Dallas, Fort Worth, Houston, and San Antonio. The parties also stipulated that Planned Parenthood has obtained a license to open a new ambulatory surgical center in Dallas, and announced its intention to open another one in San Antonio. However, the parties further stipulated that all other abortion facilities now licensed by the State of Texas cannot currently

comply with the provision. The district court concluded that this reduction in supply of clinics was an undue burden and facially invalidated the ambulatory surgical center provision. In doing so, the district court applied neither the Fifth Circuit's "no set of circumstances" test nor *Casey*'s "large fraction" test. Instead, the district court found that "a *significant number* of the reproductive-age female population of Texas will need to travel considerably further in order to exercise its right to a legal previability abortion." *Whole Woman's Health*, slip op. at 9 (emphasis added). The district court "conclude[d] that the practical impact on Texas women due to the clinics' closure statewide would operate for a *significant number* of women in Texas just as drastically as a complete ban on abortion." *Id.* at 11 (emphasis added). However, under this circuit's precedent, and *Carhart*, a "significant number" is insufficient unless it amounts to a "large fraction." *See Abbott II*, 748 F.3d at 600 ("[T]he regulation will not affect a significant (much less 'large') fraction of such women. . . .").

The district court also erred when it balanced the efficacy of the ambulatory surgical center provision against the burdens the provision imposed. In the district court's view, "the severity of the burden imposed by both requirements is not balanced by the weight of the interests underlying them." *Whole Woman's Health*, slip op. at 13. As support for this proposition, the court evaluated whether the ambulatory surgical center provision would actually improve women's health and safety. *Id.* at 14-15 ("The court concludes that it is unlikely that the stated goal of

the requirement—improving women's health—will actually come to pass."). This approach contravenes our precedent. In our circuit, we do not balance the wisdom or effectiveness of a law against the burdens the law imposes. *See Abbott II*, 748 F.3d at 593-94, 597 (conducting a two-step approach, first determining whether the law at issue satisfies rational basis, then whether it places a substantial obstacle in the path of a large fraction of women seeking abortions); *see also Harris v. McRae*, 448 U.S. 297, 325-26 (1980) ("It is not the mission of this Court or any other to decide whether the balance of competing interests . . is wise social policy.").

The district court's weighing of the interests basically boils down to the district court's own view that the facilities are already safe for women and that the ambulatory surgical center provision, when implemented, will not serve to promote women's health. However, *Abbott II* discusses in detail the perils of second-guessing the wisdom of the legislature in a constitutional challenge:

> If legislators' predictions about a law fail to serve their purpose, the law can be changed. Once the courts have held a law unconstitutional, however, only a constitutional amendment, or the wisdom of a majority of justices overcoming the strong pull of *stare decisis*, will permit that or similar laws to again take effect.

Abbott II, 748 F.3d at 594. Moreover, the district court's approach ratchets up rational basis review into a pseudo-strict-scrutiny approach by examining

whether the law advances the State's asserted purpose.[11] Under our precedent, we have no authority by which to turn rational basis into strict scrutiny under the guise of the undue burden inquiry.

Plaintiffs argue that the district court's balancing approach is used by other circuits. We agree with Plaintiffs that some circuits have used the balancing test to enjoin abortion regulations; other circuits—including ours—have not. *Compare Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905, 914 (9th Cir. 2014), *and Planned Parenthood of Wisc., Inc. v. Van Hollen*, 738 F.3d 786, 791-99 (7th Cir. 2013), *with Abbott II*, 748 F.3d at 593-94, 597, *Planned Parenthood Sw. Ohio Region v. DeWine*, 696 F.3d 490, 515 (6th Cir. 2012), *Greenville Women's Clinic v. Bryant*, 222 F.3d 157 (4th Cir. 2000), *and Women's Health Center of W. Cnty., Inc. v. Webster*, 871 F.2d 1377 (8th Cir. 1989). We are bound to follow our circuit's approach.

In addition, Plaintiffs argue that *Barnes v. Mississippi*, 992 F.2d 1335 (5th Cir. 1993) supports a

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[11] This is particularly problematic in a facial challenge to a newly enacted law. "Most legislation deals ultimately in probabilities, the estimation of the people's representatives that a law will be beneficial to the community. Success often cannot be 'proven' in advance. The court may not replace legislative predictions or calculations of probabilities with its own, else it usurps the legislative power." *Abbott II*, 748 F.3d at 594 (citing *Heller v. Doe*, 509 U.S. 312, 319 (1993)).

balancing approach.[12] However, a careful reading of *Barnes* establishes that it does not support Plaintiffs' argument. In *Barnes*, we cited *Casey* for the proposition that "the constitutionality of an abortion regulation turns on an examination of the *importance* of the state's interests in the regulation and the severity of the burden that regulation imposes on a woman's right to seek an abortion." 992 F.2d at 1339 (emphasis added). We then analyzed the *importance* of the State's interest in parental involvement statutes, without considering the extent to which the challenged law actually advanced that interest. Likewise here, the health of women seeking abortions is an important purpose. *See Abbott II*, 748 F.3d at 594-96. Our only remaining task is to analyze the severity of the burden the regulation imposes on women's right to seek abortions.

The district court's failure to apply the "large fraction" test, and its reliance on its own balancing of the State's justifications against the burdens imposed by the law, weigh in favor of the State's strong likelihood of success on the merits. Moreover, application of the "large fraction" test to the evidence before us further supports the State's position that the evidence at the four-day trial is insufficient to show that a "large fraction" of women seeking abortions would

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[12] The concurring and dissenting opinion seems to agree with Plaintiffs' and the district court's views on the balancing approach, as well as their interpretation of *Barnes*.

face an undue burden on account of the ambulatory surgical center provision.

Plaintiffs' expert, Dr. Daniel Grossman, opined that the ambulatory surgical center provision would increase driving distances for women generally, noting that after the provision becomes effective, 900,000 out of approximately 5.4 million women of reproductive age in Texas would live at least 150 miles from the nearest clinic. *Whole Woman's Health*, slip op. at 8-9. He did not testify specifically about how many women seeking abortions would have to drive more than 150 miles or whether that number would amount to a large fraction. *See Abbott II*, 748 F.3d at 583 ("[A]n increase of travel of less than 150 miles for some women is not an undue burden under *Casey*.") (citing *Abbott I*, 734 F.3d at 415). Assuming that women seeking abortions are proportionally distributed across the state, Dr. Grossman's evidence suggests that approximately one out of six (16.7%) women seeking an abortion will live more than 150 miles from the nearest clinic.[13]

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[13] The State's expert, Todd Giberson, testified that "90.6% of Texas women ages 15-44 live within 150 miles of [an ambulatory surgical center abortion facility] or live in an area that is not within 150 miles of an abortion provider due to reasons not alleged to be related to the Act." This testimony was not rebutted, but the district court found Mr. Giberson to be less credible. *Whole Woman's Health*, slip op. at 9 n.4. Even if we ignore Mr. Giberson's testimony and rely on the 17% figure gleaned from Dr. Grossman's testimony, Plaintiffs cannot satisfy the large fraction test.

Even assuming, *arguendo*, that 150 miles is the relevant cut-off, this is nowhere near a "large fraction." *See Abbott II*, 748 F.3d at 600. As discussed above, the *Casey* plurality, in using the "large fraction" nomenclature, departed from the general standard for facial challenges. The general standard for facial challenges allows courts to facially invalidate a statute only if "no possible application of the challenged law would be constitutional." *Abbott II*, 748 F.3d at 588. In other words, the law must be unconstitutional in 100% of its applications. We decline to interpret *Casey* as changing the threshold for facial challenges from 100% to 17%.[14]

Plaintiffs argue that the appropriate denominator in the large fraction analysis consists only of women "who could have accessed abortion services in Texas prior to implementation of the challenged requirements, but who will face increased obstacles as a result of the law." To narrow the denominator in this way—to essentially only those women who Plaintiffs argue will face an undue burden—ignores precedent.

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[14] The concurring and dissenting opinion inexplicably contends that, on this record, the large fraction test is satisfied. This is baffling and ignores the baseline from which the large fraction test was derived. It also ignores *Abbott II*'s guidance that a burden that "does not fall on the vast majority of Texas women" does not meet the large fraction test. 748 F.3d at 600. Moreover, the concurring and dissenting opinion fails to justify its reliance on the "large fraction" test to the exclusion of the "no set of circumstances" test, which, as discussed, is the law of our circuit. *See Barnes*, 992 F.2d at 1342; *Abbott II*, 748 F.3d at 588.

Casey itself counsels that the denominator should encompass all women "for whom the law is a restriction." *Casey*, 505 U.S. at 894 (involving a spousal consent requirement that applied to married women who did not want to obtain consent). This is also the approach that our circuit used in *Abbott II*, 748 F.3d at 598 (using a denominator of "women seeking an abortion in Texas" when addressing a facial challenge of H.B. 2 under the large fraction test). Here, the ambulatory surgical center requirement applies to every abortion clinic in the State, limiting the options for all women in Texas who seek an abortion. The appropriate denominator thus includes all women affected by these limited options. Moreover, Plaintiffs' suggested approach would make the large fraction test merely a tautology, always resulting in a large fraction. The denominator would be women that Plaintiffs claim are unduly burdened by the statute, and the numerator would be the same.[18]

Based on unspecific testimony at trial, the district court also noted "practical concerns" that combine with increased travel distances, particularly for disadvantaged, minority, and immigrant populations. *See Whole Woman's Health*, slip op. at 11-12 (listing

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[18] Here, we use the same denominator as the panel in *Abbott II*—women seeking an abortion in Texas. We note that even if the denominator excluded women who will not have to change clinics as a result of the ambulatory surgical center provision—for whom the provision arguably is not a restriction—Plaintiffs offered no evidence from which we could conclude that a large fraction of the remaining women will face an undue burden.

"lack of availability of child care, unreliability of transportation, unavailability of appointments at abortion facilities, unavailability of time off from work, immigration status and inability to pass border checkpoints, poverty level, the time and expense involved in traveling long distances, and other inarticulable psychological obstacles." *Id.* at 11.). We do not doubt that women in poverty face greater difficulties. However, to sustain a facial challenge, the Supreme Court and this circuit require Plaintiffs to establish that the law itself imposes an undue burden on at least a large fraction of women. Plaintiffs have not done so here.

The district court also relied on its own determination that the ambulatory surgical center provision would cause a shortage in capacity for the remaining licensed clinics. The district court found that 60,000-72,000 abortions were performed annually in previous years. *Id.* at 8. After the ambulatory surgical center provision goes into effect, it is undisputed that seven or eight clinics will remain. *Id.* at 11. Based on Dr. Grossman's testimony, the district court then determined that each remaining clinic would have to manage, on average, 7,500-10,000 patients a year, over 1,200 patients per month in some cases. *Id.* The district court found that handling this high a caseload "stretches credulity."

However, the district court did not make any findings of fact to support its conclusion. Nor could it, given that Dr. Grossman's testimony is *ipse dixit* and the record lacks any actual evidence regarding the

current or future capacity of the eight clinics.[16] Dr. Grossman simply assumes, without evidence, that these centers are currently operating at full capacity and will be unable to accommodate any increased demand. Likewise, Dr. Grossman did not consider how many physicians with admitting privileges from non-ambulatory surgical centers will begin providing abortions at the ambulatory surgical center clinics, thereby increasing those clinics' capacities. It also does not appear from the record that Dr. Grossman considered the possibility of additional capacity resulting from new clinics' being built, nor did he consider that the demand for abortion services in Texas may decrease in the future, as it has done nationally over the past several years. Furthermore, the record lacks evidence that the previous closures resulting from the admitting privileges requirement have caused women to be turned away from clinics. Without any evidence on these points, Plaintiffs do not

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[16] In *Abbott II*, the testimony of an expert who was part of the same research team as Dr. Grossman offered similarly unsupported conjecture when predicting that, as a result of the *admitting privileges requirement*, approximately 22,000 women in Texas would be unable to obtain abortions. On cross-examination in this case, Dr. Grossman admitted that his colleague's earlier predictions proved to be inaccurate. Dr. Grossman testified in this case that there had been a decrease of only 9,200 abortions and that the decrease could not be wholly ascribed to the admitting privileges requirement. Indeed, Dr. Grossman acknowledged on cross-examination that in his team's published, peer-reviewed article, the researchers qualified their findings by noting that they "cannot prove causality between the State restrictions and falling abortion rate."

appear to have met their burden to show that the ambulatory surgical center provision will result in insufficient clinic capacity that will impose an undue burden on a large fraction of women.[17]

The evidence does indicate, without specificity, that by requiring all abortion clinics to meet the minimum standards of ambulatory surgical centers, the overall cost of accessing an abortion provider will likely increase. However, as the Supreme Court recognized in *Carhart*, and we observed in *Abbott I*, "'[t]he fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it.'" *Abbott I*, 734 F.3d at 413 (alteration in original) (quoting *Carhart*, 550 U.S. at 157-58).

In sum, the State has met its burden as to the district court's facial invalidation of the admitting privileges requirement and the ambulatory surgical center provision.[18]

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[17] The concurring and dissenting opinion speculates that patients seeking abortions will face delays comparable to those discussed by the Seventh Circuit in *Planned Parenthood of Wisc., Inc. v. Van Hollen*, 738 F.3d 786 (7th Cir. 2013). Here, there is no evidence in the record that women have faced delays, have been turned away for lack of capacity, or will face delays in the future.

[18] Even if the facial invalidation of the ambulatory surgical center provision were upheld, the injunction should still be stayed as to the operational requirements of the provision. *See infra* Part V.C.

V.

Finally, we address the district court's injunctions of both requirements as applied to clinics in McAllen and El Paso, as well as the ambulatory surgical center provision as applied to medication abortion, and the State's likelihood of success on the merits of each. We conclude that the State has met its burden as to each, with the exception of the ambulatory surgical center provision as applied to El Paso.

A.

The State has shown a strong likelihood of success on the merits of its argument that Plaintiffs' as-applied challenges to the admitting privileges requirement are barred by res judicata. In the interests of efficiency and finality, the doctrine of res judicata bars litigation of claims that have been litigated or could have been raised in a prior lawsuit. In the lawsuit giving rise to *Abbott I* and *Abbott II*, Plaintiffs facially challenged the admitting privileges requirement. They also could have brought, but chose not to bring, as-applied challenges with regard to clinics in El Paso and McAllen.[19] Their choice not to include the as-applied challenges in their previous lawsuit likely precludes them from pursuing that challenge now. *See Brown v. Felsen*, 442 U.S. 127,

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[19] Plaintiffs did bring simultaneous facial and as-applied challenges to the ambulatory surgical center requirement of H.B. 2.

131 (1979) ("Res judicata prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding.").

To be sure, res judicata bars a subsequent lawsuit only if, *inter alia*, the same "claim or cause of action" is involved in both lawsuits. *Petro-Hunt, L.L.C. v. United States*, 365 F.3d 385, 395 (5th Cir. 2004).[20] To determine whether two lawsuits involve the same "claim or cause of action" for purposes of res judicata, the Fifth Circuit applies the transactional test of the Restatement (Second) of Judgments, § 24. *Id.* Under that test, the "critical issue is whether the two actions under consideration are based on 'the *same nucleus of operative facts.*'" *Southmark Corp. v. Coopers & Lybrand* (*In re Southmark Corp.*), 163 F.3d 925, 934 (5th Cir. 1999) (quoting *Bank of Lafayette v. Baudoin* (*In re Baudoin*), 981 F.2d 736, 743 (5th Cir. 1993)). If the facts on which the second lawsuit is based are the same as those prevailing at the time of the first lawsuit, the two lawsuits involve the same "claim or cause of action" for purposes of res judicata.

Plaintiffs contended, and the district court agreed, that the present lawsuit relies on a different

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[20] Res judicata also requires that the parties are identical to, or in privity with, the parties in the previous lawsuit. Plaintiffs do not dispute that they are identical to or in privity with the plaintiffs in *Abbott I and II*.

set of operative facts than did the pre-enforcement challenge because the abortion clinics in McAllen and El Paso have now ceased providing abortion services. However, our precedent dictates that changed circumstances prevent the application of res judicata only if the change is "significant" and creates "new legal conditions." *Hernandez v. City of Lafayette*, 699 F.2d 734, 737 (5th Cir. 1983). The closure of the clinics in McAllen and El Paso does not create "new legal conditions" because, in the pre-enforcement challenge, Plaintiffs alleged that the McAllen and El Paso clinics would shut down upon implementation of H.B. 2. Plaintiffs could have relied on these allegations to bring the very same as-applied challenge they now pursue; they simply chose not to do so.

The district court stated that "it was not known in late October 2013 [i.e., when the district court entered its judgment in *Abbott*] that the McAllen and El Paso clinics' physicians would ultimately be unable to obtain admitting privileges despite efforts to secure them." However, the Complaint in *Abbott*, which was filed in September 2013, expressly alleged that those clinics would close if the admitting privileges requirement took effect. Indeed, the physicians who performed abortions at those two facilities were named plaintiffs in *Abbott*, further undermining any suggestion that the closure of the clinics was

a significant or unexpected change of facts.[21] Thus, Plaintiffs' as-applied challenges to the admitting privileges requirement are likely barred by res judicata.

B.

Even if Plaintiffs' claims are not barred by res judicata, the State is still likely to succeed on the merits of whether the admitting privileges requirement and the ambulatory surgical center provision, as applied to the McAllen clinic, have the effect of imposing an undue burden on women in the Rio Grande Valley.

The admitting privileges requirement went into effect in October 2013. Since that time, abortion clinics have remained open in all of the major metropolitan areas across the state. The district court found that the number of total clinics in Texas decreased from more than forty clinics to fewer than thirty clinics "leading up to and in the wake of enforcement of the admitting-privileges requirement." *Whole Woman's Health*, slip op. at 8; *but see Abbott II*,

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[21] In the district court, plaintiffs also argued that res judicata does not bar their as-applied challenge because "the panel's decision in *Abbott* is not yet final." However, unless and until *Abbott II* is vacated, it is binding precedent that this panel is not at liberty to ignore. Under this circuit's rule of orderliness, "only an intervening change in the law (such as by a Supreme Court case) permits a subsequent panel to decline to follow a prior Fifth Circuit precedent." *United States v. Alcantar*, 733 F.3d 143, 145 (5th Cir. 2013).

748 F.3d at 599 (noting that a number of these clinics had closed for reasons other than the admitting privileges requirement). Importantly, Dr. Grossman stated in his declaration that he was not "offering any opinion on the cause of the decline in the number of abortion facilities from November 2012 to April 2014." The district court further found that no abortion providers are in operation in a number of cities, including, for example, McAllen, Lubbock, Midland, and Waco. *Whole Woman's Health*, slip op. at 8. The ambulatory surgical center provision was set to go into effect on September 1, 2014, which the district court found would cause even more closures, leaving only seven or eight licensed providers. *Id.* at 10-11.

The district court found that the McAllen clinic closed as a result of the admitting privileges requirement. *Id.* at 8. Since that time, the women who would have otherwise been served by the McAllen clinic had to look elsewhere for the procedure. As stated in his trial declaration, Dr. Grossman identified more than 1,000 women from the Valley who sought abortions between November 2013 and April 2014, and traveled to nearby cities where clinics remained open. During that period, approximately 50% of those women traveled to Corpus Christi, 25% traveled to Houston, 15% percent to San Antonio, and 10% to a location even farther from the Valley.

In *Abbott II*, relying on *Casey*, we held that having to travel 150 miles from the Rio Grande Valley to Corpus Christi is not an undue burden. *Abbott II*,

748 F.3d at 598. Indeed, *Casey* permitted even greater travel distances, as it upheld a 24-hour waiting period that doubled driving times, increasing the drive for some women from three hours to six hours.[22] *See id.*

While the clinic in Corpus Christi remained open after the admitting privileges requirement went into effect, it currently does not comply with the ambulatory surgical center provision. The district court found that once the provision takes effect, the clinic nearest to the Rio Grande Valley will be in San Antonio, between 230 and 250 miles away. Therefore, we must determine whether the State is likely to prevail on its argument that this incremental increase of 100 miles in distance does not constitute an undue burden.

At trial, Plaintiffs had the burden of showing that the additional travel distance to San Antonio constituted an undue burden. As noted above, the record indicates that 50% of the more than 1,000 women in Dr. Grossman's study who resided in the Rio Grande Valley and were seeking abortions traveled to San Antonio and Houston (which is even farther than San Antonio) even when the Corpus Christi clinic was still in operation. Plaintiffs also

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[22] It is also important to note that Texas has a 24-hour waiting period, which Plaintiffs do not challenge here, but women who must travel more than 100 miles to a clinic are exempt. Tex. Health & Safety Code § 171.012(a)(4).

had the burden, which they failed to meet, of showing that clinics in San Antonio and other nearby cities would be unable to manage the additional demand for abortions caused by closures. Indeed, women from McAllen have been traveling outside their city for nearly a year and Plaintiffs made no showing that clinics in San Antonio (or any other city) have been deluged. Considering that *Casey* upheld travel times of six hours (increases of three hours) and that women in the Rio Grande Valley traveling to San Antonio have less total travel time than women affected by the Pennsylvania law in *Casey*, the State has a strong likelihood of success on its appeal of the injunctions of both requirements as applied to the McAllen clinic.[23]

C.

As to the El Paso clinic, we grant, in part, and deny, in part, the State's motion to stay the district court's injunction of the ambulatory surgical center provision. The district court found that the physical plant requirements of the ambulatory surgical center provision would force the El Paso clinic to close. As a result, women in El Paso will be significantly farther from the nearest in-state ambulatory surgical center than women in the Rio Grande Valley. The distance

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[23] In light of *Abbott II*, the concurring and dissenting opinion does not explain how the incremental increase of approximately 100 miles between Corpus Christi and San Antonio constitutes an undue burden.

from El Paso to San Antonio, for example, is greater than 500 miles. The Eighth Circuit has held that no travel distance within the state is too far. *See Fargo Women's Health Org. v. Schafer*, 18 F.3d 526, 533 (8th Cir. 1994). We have not so held. Our circuit has not identified whether there is a tipping point within the vast State of Texas, but at this early stage, we are hesitant to extend *Casey* to such a large distance. *But see Abbott II*, 748 F.3d at 598 ("*Casey* counsels against striking down a statute solely because women may have to travel long distances to obtain abortions.").

It is true that approximately half of the women from El Paso seeking abortions travel to Santa Teresa, New Mexico, which is in the same metropolitan area as El Paso and just across the state line. Despite the obvious practical implications of the New Mexico clinic's proximity to El Paso, our circuit's precedent suggests that our focus must remain on clinics within Texas when determining whether travel times create an undue burden. *See Jackson Women's Health Org.*, 760 F.3d at 457-58 (enjoining a Mississippi law on the grounds that it would shut down the only abortion clinic in the state). Although the situation in Texas is markedly different from that in Mississippi, the opinion in *Jackson* contains broad language that appears to go beyond the facts presented in that case. *See id.* at 457 ("Consistent with *Gaines*, we hold that the proper formulation of the undue burden analysis focuses solely on the effects within the regulating state—here, Mississippi."). The panel majority saw

itself as "require[d] . . . to conduct the undue burden inquiry by looking only at the ability of Mississippi women to exercise their right within Mississippi's borders." *Id.* Given the panel's reliance on *Gaines*, the panel may have meant to apply its limitation only to states where all the abortion clinics would close. However, we are reluctant to construe the panel's broad language so narrowly in this emergency stay proceeding. Because of the long distance between El Paso and the nearest in-state abortion clinic, as well as the doubt that *Jackson* casts on whether we may look to out-of-state clinics, the State has not shown a strong likelihood of success on the merits of the challenge to the physical plant requirements of the ambulatory surgical center provision as applied to El Paso. Thus, the district court's injunction of the physical plant requirements of the ambulatory surgical provision will remain in force for El Paso.

We do, however, stay the injunction as to the operational requirements of the ambulatory surgical center provision because the district court made no findings about whether the El Paso clinic would be able to comply with those requirements. The district court's conclusion that the ambulatory surgical center provision imposed an undue burden rested solely on the district court's findings regarding the physical plant requirements. In view of H.B. 2's severability provision, as well as the similar provision in the regulations, 25 Tex. Admin. Code § 139.9, the district court erred by failing to consider whether the physical plant requirements could be severed from the

operational requirements, allowing the operational requirements to take effect. *See Abbott I*, 734 F.3d at 415.[24] As a result, it does not appear that the district court's injunction of the operational requirements was supported by any evidence. We therefore stay the district court's injunction of the operational requirements.

D.

The district court also enjoined the ambulatory surgical center provision as applied to medication abortions. To the extent the district court concluded that the ambulatory surgical center provision had an improper purpose as applied to medication abortion, we have already rejected that argument for the reasons stated above. To the extent that the district court determined that the provision's effect as applied to medication abortion was unconstitutional, the record evidence does not support that conclusion. In conducting its own balancing analysis, the district court stated that "any medical justification for the requirement is at its absolute weakest in comparison with the heavy burden it imposes." *Whole Woman's Health*, slip op. at 18. However, as discussed, our circuit does not incorporate a balancing analysis into the undue burden inquiry. *See Abbott II*, 748 F.3d at

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[24] Indeed, the district did not appear to address the constitutionality of the implementing regulations. To the extent that it invalidated the regulations *sub silentio*, its failure to consider the severability provision in the regulations was error.

594 (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985)). The district court provided no support for its conclusion other than its improper balancing. The district court did not cite to record evidence or make any findings to support its conclusion that the ambulatory surgical center provision imposes an undue burden as applied to medication abortions.[25] Indeed, at oral argument, Plaintiffs could not identify any findings in the district court's opinion supporting the conclusion that the ambulatory surgical center provision imposed an undue burden as applied to medication abortion. Thus, the State has shown a substantial likelihood of success on the merits of the district court's injunction of the ambulatory surgical center provision as applied to medication abortions.

VI.

As in *Abbott I*, the State has made a strong showing of likelihood of success on the merits of its appeal as to all of the district court's injunctions except for the injunction of the physical plant requirements of the ambulatory surgical center provision as applied to the clinic in El Paso. Regarding the other three factors we must weigh in determining whether to grant a motion to stay pending appeal, the

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[25] In *Abbott II*, we noted that medication abortions have higher complication rates than surgical abortions. *Abbott II*, 748 F.3d at 602.

State has also met its burden. When a statute is enjoined, the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws. *Abbott I*, 734 F.3d at 419 (citing *Maryland v. King*, 133 S. Ct. 1, 3 (2012); *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977)). The public interest is directly aligned with the State's interest. *Nken*, 556 U.S. at 435. To the extent the State's interest is at stake, so is the public's. *Abbott I*, 734 F.3d at 419. We recognize that Plaintiffs have also made a strong showing that their interests will be injured by a grant of the stay. However, given that the first two factors are the most critical, *Nken*, 556 U.S. at 434, and the State has made a strong showing regarding each, a stay is appropriate. We have addressed only the issues necessary to rule on the motion for a stay pending appeal, and our determinations are for that purpose and do not bind the merits panel. *See, e.g.*, *Abbott I*, 734 F.3d at 419.

IT IS ORDERED that Appellants' opposed motion for stay pending appeal is GRANTED, in part, and DENIED, in part, and that the district court's injunction orders are STAYED until the final disposition of this appeal, in accordance with this opinion.

STEPHEN A. HIGGINSON, Circuit Judge, concurring in part and dissenting in part:

I too would deny the State's motion for a *blanket* stay of the district court judgment entered on August 29, 2014, pending appeal. I agree with a stay of the district court's facial invalidation of the admitting-privileges requirement because the plaintiffs did not request that relief. *See Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 458 (5th Cir. 2014). Second, I agree with a stay to allow enforcement of the operational requirements of the ambulatory surgical center ("ASC") provision because the district court only evaluated the burdens imposed by the provision's physical plant requirements. Applying H.B. 2's severability provision, however, I would not stay the district court's facial invalidation of the physical plant requirements. Finally, I would narrow the stay so that it does not reach the admission-privileges requirement as applied to the McAllen and El Paso clinics, which the district court found would result in closure of all clinics west and south of San Antonio.[1]

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[1] I do not believe that the State has shown a strong likelihood of success on the merits of its argument that this as-applied challenge is barred by res judicata. This court in *Abbott II* disavowed relying on any new factual developments that were not in the record before the district court during the bench trial in *Abbott*. *See Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott* (*Abbott II*), 748 F.3d 583, 599 n.14 (5th Cir. 2014). Significantly, *Abbott II* anticipated that physicians, like those in McAllen and El Paso, would gain admitting privileges. *See id.* at 598-99 & n.13; *see also Planned Parer.thood of*

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As to the first stay factor, the district court found, after trial with witness credibility determinations, that an undue burden existed because Texas had over forty abortion clinics prior to the enactment of H.B. 2, and that after the ASC provision takes effect, only seven or eight clinics will remain, representing more than an 80% reduction in clinics statewide in nearly fourteen months, with a 100% reduction in clinics west and south of San Antonio. *See Okpalobi v. Foster*, 190 F.3d 337, 357 (5th Cir. 1999) ("A measure that has the effect of forcing all or a substantial portion of a state's abortion providers to stop offering such procedures creates a substantial obstacle to a woman's right to have a pre-viability abortion, thus constituting an undue burden under *Casey*."), *vacated on other grounds on reh'g en banc*, 244 F.3d 405 (5th Cir. 2001); *cf. also Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (finding no undue burden when "no

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Wis., Inc. v. Van Hollen, 738 F.3d 786, 807 (7th Cir. 2013) (Manion, J., concurring) ("The notion that abortion doctors will be unable to obtain admitting privileges is a fiction."). Indeed, as *Abbott II* acknowledged, "[l]ater as-applied challenges can always deal with subsequent, concrete constitutional issues." *Id.* at 589; *see also Jackson Women's Health Org.*, 760 F.3d at 450-51 (evaluating the impact of H.B. 1390 after the plaintiff's doctors were conclusively denied admitting privileges). Now that the physicians' applications have been denied, the availability of abortion services for women living near the McAllen and El Paso clinics has concretely changed. *See* Restatement (Second) of Judgments § 24, cmt. (f) ("Where important human values are at stake, even a slight change of circumstances may afford a sufficient basis for concluding a second action may be brought.").

woman seeking an abortion would be required by the new law to travel to a different facility than was previously available"); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 869 (1992) ("[I]t falls to us to give some real substance to the woman's liberty to determine whether to carry her pregnancy to full term."). The district court further found that there was no credible evidence of medical or health benefit associated with the ASC requirement in the abortion context. At this emergency stay point, the State does not challenge as clear error either set of factual findings.[2] Weighing lack of medical benefit against

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[2] The majority opinion lists the following additional findings made by the district court, which are entitled to deference, *see Anderson v. Bessemer*, 470 U.S. 564, 573-74 (1985); *N.A.A.C.P. v. Fordice*, 252 F.3d 361, 365 (5th Cir. 2001): (1) the construction costs of bringing existing clinics into compliance with ASC standards "will undisputedly approach 1 million dollars and will most likely exceed 1.5 million dollars"; (2) for existing clinics that cannot comply due to physical space limitations, "[t]he cost of acquiring land and constructing a new compliant clinic will likely exceed three million dollars"; (3) if both challenged H.B. 2 provisions are enforced, women's travel distances to clinics will significantly increase: 1.3 million women of reproductive age in Texas will live more than 100 miles from a clinic, 900,000 women will live more than 150 miles from a clinic, 750,000 women will live more than 200 miles from a clinic, and some women will live as far as 500 miles from a clinic; (4) the burdens of increased travel combine with "practical concerns include[ing] lack of availability of child care, unreliability of transportation, unavailability of appointments at abortion facilities, unavailability of time off from work, immigration status and poverty level, [and] the time and expense involved in traveling long distances"; and (5) the remaining

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the significant reduction in clinic access, the district court found the burden to be "undue."

The majority opinion disagrees, concluding especially that the district court "erred when it balanced the efficacy of the ambulatory surgical center provision against the burdens the provision imposed." For my part, I do not read *Abbott II* to preclude consideration of the relationship between the severity of the obstacle imposed and the weight of the State's interest in determining if the burden is "undue." Although I agree with the majority opinion that *Abbott II* rejected the district court's assessment of empirical data as part of its *rational-basis* analysis, *see* 748 F.3d at 594, *Abbott II* did not expressly disclaim such an inquiry for purposes of the *undue-burden* prong, *see id.* at 590 (referring to "*Casey's* undue burden *balancing* test" (emphasis added)). In *Abbott II*—in contrast to the district court's factual findings in this case—our court concluded that there had been "no showing whatsoever that *any* woman [would] lack reasonable access to a clinic within Texas." *Id.* at 598. In light of the minimal or non-existent burden found on that record, the court in *Abbott II* did not need to conduct an in-depth analysis of the State's interest as part of its undue-burden review. Other courts' criticism of *Abbott II* on this ground is therefore inexact. *See Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905, 914 (9th Cir. 2014); *Planned*

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seven or eight clinics will unlikely have the capacity to perform 60,000-72,000 abortions per year in Texas.

Parenthood Se., Inc. v. Strange, No. 2:13cv405-MHT, 2014 WL 3809403, at *7-8 (M.D. Ala. Aug. 4, 2014).

Consistent with this analysis, the district court considered the weight of the State's interest in its undue-burden review. *See Barnes v. Mississippi*, 992 F.2d 1335, 1338 (5th Cir. 1993) ("As long as *Casey* remains authoritative, the constitutionality of an abortion regulation thus turns on an examination of the importance of the state's interest in the regulation and the severity of the burden that regulation imposed on the woman's right to seek an abortion."); *see also Casey*, 505 U.S. at 878 ("*Unnecessary* health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right." (emphasis added)). In doing so, the district court adhered to reasoning that reconciles, rather than divides, circuit authority applying *Casey's* undue-burden test. *See, e.g.*, *Humble*, 753 F.3d at 912 ("[W]e compare the extent of the burden a law imposes on a woman's right to abortion with the strength of the state's justification of the law. The more substantial the burden, the stronger the state's justification for the law must be to satisfy the undue burden test."); *Van Hollen*, 738 F.3d at 798 ("The feebler the medical grounds, the likelier the burden, even if slight, to be 'undue' in the sense of disproportionate or gratuitous."); *see also* ROBERT A. LEFLAR, APPELLATE JUDICIAL OPINIONS 235 (1974) ("[C]ompeting values must somehow be brought together so that as much

as possible of the good in each can be protected and preserved.").

I also do not see a strong likelihood of legal error related to the district court's demographic calculations pertaining to impact on women, relevant both to its facial invalidation of the ASC provision, as well as to our stay factors. First, the district court recognized that there are 5.4 million women of reproductive age in Texas. Next, the district court found that if the ASC provision goes into effect, 900,000 women will live more than 150 miles from an abortion clinic; 750,000 women will live more than 200 miles from a clinic; and some women will live as far as 500 miles or more from a clinic. Furthermore, the district court explicitly considered the financial and other practical obstacles that interact with and compound the burdens imposed by the law, both in it [sic] its discernment of a substantial obstacle and also in its assessment of impact on women.[3] Finally, the district court also found that the remaining seven or eight abortion ASCs lack sufficient capacity to accommodate all women seeking abortions in the state. Indeed, these remaining clinics would have to increase by at least fourfold the number of abortions they perform

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[3] Indeed, the State forthrightly acknowledged during oral argument that the real-world context in which women's decisions are made and operate does factor into the undue-burden analysis, even if the State will contend that the record does not support the interplay of circumstance and law that the district court held to be determinative.

annually. Altogether, although the district court did not use the phrase "large fraction," its findings—which related not only to travel distances but also to other practical obstacles—demonstrate that enforcement of the ASC provision will likely affect a significant number *and* a large fraction of women across the state of Texas. *See Casey*, 505 U.S. at 893-95 (facially invalidating Pennsylvania's spousal-notification requirement because it would "likely prevent a *significant number* of women from obtaining an abortion" (emphasis added)).

As to the remaining stay factors, which reasonable minds may balance differently, and in this case do, it is nonetheless undisputed that the State for decades has not held plaintiffs' clinics to ASC standards—indeed, never until now. Based on the record established at trial, assessed firsthand by the district court, I do not perceive that Texas has demonstrated urgency, medical or otherwise, to immediate enforcement. After hearing conflicting expert testimony, the district court found that "abortion in Texas [is] extremely safe with particularly low rates of serious complications," and further found that "risks are not appreciably lowered for patients who undergo abortion at ambulatory surgical centers." The denial of a stay would preserve this status quo pending our court's ultimate decision on the correctness of the district court's ruling. *See Commodity Futures Trading Comm'n v. British Am. Commodity Options Corp.*, 434 U.S. 1316, 1320 (1977).

On the other hand, the district court found that if the ASC requirement goes into effect plaintiffs likely will suffer substantial injury, notably that enforcement would cause clinics to close in Corpus Christi, San Antonio, Austin, McAllen, El Paso, Houston, and Dallas. The longer these clinics remain closed, the less likely they are to reopen if this court affirms that the law is unconstitutional. The district court further found that only seven or eight clinics will remain open, and that these clinics alone lack sufficient capacity. Unless shown to be clear error, this circumstance is comparable to the one the Seventh Circuit observed would subject patients "to weeks of delay because of the sudden shortage of eligible [clinics]—and delay in obtaining an abortion can result in the progression of a pregnancy to a stage at which an abortion would be less safe, and eventually illegal." *See Van Hollen*, 738 F.3d at 796.

Agreeing not to impose a blanket stay on direct appeal, but not having convinced colleagues whom I respect as to the scope of the stay that is appropriate, I would grant the State's independent request to expedite its appeal of an underlying issue that has complexity which divides courts, as well as profundity which divides convictions deeper than the rules of law courts must apply.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

WHOLE WOMAN'S HEALTH, AUSTIN WOMAN'S HEALTH CENTER, KILLEEN WOMAN'S HEALTH CENTER, NOVA HEALTH SYSTEMS D/B/A REPRODUCTIVE SERVICES, AND SHERWOOD C. LYNN, JR., M.D., PAMELA J. RICHTER, D.O., AND LENDOL L. DAVIS, M.D., EACH ON BEHALF OF THEMSELVES AND THEIR PATIENTS,	§	
PLAINTIFFS,	§	CAUSE NO. 1:14-CV-284-LY
V.	§	
DAVID LAKEY, M.D., COMMISSIONER OF THE TEXAS DEPARTMENT OF STATE HEALTH SERVICES, IN HIS OFFICIAL CAPACITY, AND MARI ROBINSON, EXECUTIVE DIRECTOR OF THE TEXAS MEDICAL BOARD, IN HER OFFICIAL CAPACITY,	§	
DEFENDANTS.	§	

MEMORANDUM OPINION INCORPORATING FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed Aug. 29, 2014)

Plaintiffs Whole Woman's Health, Austin Woman's Health Center, Killeen Woman's Health Center, Nova Health Systems d/b/a Reproductive Services, Dr. Sherwood Lynn, Jr., Dr. Pamela Richter, and Dr. Lendol Davis (collectively "Plaintiffs"), all providers of abortion services, bring this action on behalf of themselves and their patients against David Lakey, M.D., Commissioner of the Texas Department of State Health Services and Mari Robinson, Executive Director of the Texas Medical Board, each in their official capacities (together the "State"). Plaintiffs seek declaratory and injunctive relief nullifying two requirements of Texas law recently imposed by the Texas Legislature and the rules that implement such law. Act of July 12, 2013, 83rd Leg., 2nd C.S., ch. 1, 2013 Tex. Gen. Laws 4795; ("House Bill 2" or the "act") (codified at Tex. Health & Safety Code Ann. §§ 171.0031, 245.010(a) (West Supp. 2014)); *see also* 38 Tex. Reg. 9577-93 (adoption of proposed rules), 25 Tex. Admin. Code §§ 139.40, .53(c), .56(a).

The act's "admitting-privileges requirement" provides, in part, that "[a] physician performing or inducing an abortion must, on the date the abortion is performed or induced, have active admitting privileges at a hospital that is located not further than 30 miles from the location at which the abortion is performed or induced." Tex. Health & Safety Code Ann.

§ 171.0031(a)(1); 25 Tex. Admin. Code §§ 139.53(c), .56(a). The "ambulatory-surgical-center requirement" provides, in relevant part, that by September 1, 2014, "the minimum standards for an abortion facility must be equivalent to the minimum standards adopted under [Texas Health & Safety Code] Section 243.010 for ambulatory surgical centers." Tex. Health & Safety Code Ann. § 245.010(a); 25 Tex. Admin. Code § 139.40.

The admitting-privileges requirement was the subject of a pre-enforcement facial challenge brought by several abortion providers, including some of the plaintiffs in this case. This court permanently enjoined enforcement of the requirement on October 28, 2013. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 951 F.Supp.2d 891 (W.D. Tex. 2013). The United States Court of Appeals for the Fifth Circuit stayed the injunction, *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott* (*Abbott I*), 734 F.3d 406 (5th Cir. 2013), and ultimately reversed this court's judgment, concluding that the admitting-privileges requirement is constitutional on its face. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott* (*Abbott II*), 748 F.3d 583 (5th Cir. 2014).

Now, Whole Woman's Health and Lynn challenge the admitting-privileges requirement as applied to an abortion facility operated by Whole Woman's Health in McAllen, Texas (the "McAllen clinic"). Nova Health Systems and Richter challenge the admitting-privileges requirement as applied to an abortion

facility operated by Nova Health Systems in El Paso, Texas (the "El Paso clinic"). All Plaintiffs challenge the ambulatory-surgical-center requirement on its face and as applied to the provision of medication abortion; Whole Woman's Health and Lynn challenge the ambulatory-surgical-center requirement as applied to the McAllen Clinic; and Nova Health Systems and Richter challenge the ambulatory-surgical-center requirement as applied to the El Paso Clinic. This court has federal-question jurisdiction. *See* 28 U.S.C. §§ 1331, 1343(a). Plaintiffs occupy substantially the same position as the plaintiffs in the previous action before this court and thus have standing to assert these claims. *Abbott II*, 748 F.3d at 589.

Before trial, the court granted in part the State's motion to dismiss and dismissed several of Plaintiffs' claims with prejudice. *Whole Woman's Health v. Lakey*, No. 1:14-CV-284-LY (W.D. Tex. Aug. 1, 2014) (order on motion to dismiss). Specifically, the court dismissed Plaintiffs' equal-protection, improper-delegation-of-lawmaking-authority, and arbitrary-and-unreasonable-state-action claims. *Id.* As a result, the following claims remain: (1) the admitting-privileges requirement, as applied to the McAllen and El Paso clinics, violates the Due Process Clause of the Fourteenth Amendment with regard to women in the Rio Grande Valley and West Texas and (2) the ambulatory-surgical-center requirement, facially in regard to all Texas women and, as applied to the McAllen and El Paso clinics specifically, with regard to women in the Rio Grande Valley and West Texas, violates the Due

Process Clause of the Fourteenth Amendment. The court will also consider whether the act as a whole operates to place before the women of Texas a substantial obstacle to an abortion of a nonviable fetus.

Both parties waived a jury, and the court conducted a bench trial on these issues that commenced on August 4, 2014. All parties were represented by counsel and appeared either individually or by counsel.

Having carefully considered the parties' briefs, stipulations, exhibits, trial testimony, arguments of counsel, and the applicable law, the court concludes: (1) the act's ambulatory-surgical-center requirement places an unconstitutional undue burden on women throughout Texas and must be enjoined; (2) the act's ambulatory-surgical-center and admitting-privileges requirements, as applied to the McAllen and El Paso clinics, place an unconstitutional undue burden on women in the Rio Grande Valley, El Paso, and West Texas and must be enjoined; and (3) the act's ambulatory-surgical-center and admitting-privileges requirements operate together to place an unconstitutional undue burden on women throughout Texas and must be enjoined. In so deciding, the court makes the following findings of fact and conclusions of law.[1]

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[1] In making these findings and conclusions, the court has considered the record as a whole. The court has observed the demeanor of the witnesses and has carefully weighed that demeanor and the witnesses' credibility in determining the facts

(Continued on following page)

I. LAW GOVERNING ABORTION REGULATIONS

"The woman's right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*. It is a rule of law and a component of liberty we cannot renounce." *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 846 (1992). The Supreme Court has written of this interest held by individual women:

> [T]he liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the

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of this case and drawing conclusions from those facts. Further, the court has thoroughly considered the testimony of both sides' expert witnesses and has given appropriate weight to their testimony in selecting which conclusions to credit and upon which not to rely. *Garcia v. Kerry*, 557 Fed.Appx. 304, 309 (5th Cir. 2014) ("It is settled law that the weight to be accorded expert opinion evidence is solely within the discretion of the judge sitting without a jury. In a bench trial, the district court is not obligated to accept or credit expert witness testimony.") (citing *Pittman v. Gilmore*, 556 F.2d 1259, 1261 (5th Cir. 1977); *Albany Ins. Co. v. Anh Thi Kieu*, 927 F.2d 882, 894 (5th Cir. 1991)). All findings of fact contained herein that are more appropriately considered conclusions of law are to be so deemed. Likewise, any conclusion of law more appropriately considered a finding of fact shall be so deemed.

> infant a bond of love cannot alone be grounds for the State to insist she make the sacrifice. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.

Casey, 505 U.S. at 852.

Still, after over 40 years, this basic right—among the most contested and controversial of all rights protected by our Constitution—is layered with myriad limitations and qualifications. *See Jackson Women's Health Org. v. Currier*, No. 13-60599, ___ F.3d ___, 2014 WL 3730467, *4 (5th Cir. July 29, 2014). A state may regulate a woman's right to an abortion consistent with that state's interest in protecting the health of the mother and the potential life of the unborn. *Casey*, 505 U.S. at 846. However, a law is unconstitutional if it imposes an undue burden on a woman's right to an abortion. "A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus. . [A] statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends." *Id.* at 877 The

undue-burden standard is "the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty." *Casey*, 505 U.S. at 876. In reaching a determination of whether a law imposes an undue burden, this court looks to the entire record and factual context in which the law operates. *See id.* at 887-95 (looking to factual context in striking down Pennsylvania's spousal-notification provision); *Currier*, 2014 WL 3730467 at *9.

The Supreme Court added rational basis review to the judicial evaluation of abortion regulations in *Gonzales v. Carhart*, 550 U.S. 124, 158 (2007) ("Where it has a rational basis to act, *and* it does not impose an undue burden, the State may use its regulatory power. . . .") (emphasis added); *see also Currier*, 2014 WL 3730467 at*4; *Abbott II*, 748 F.3d at 590. Bound by the Fifth Circuit's holding in *Abbott II*, this court held that both the ambulatory-surgical-center requirement and the admitting-privilege requirement, as applied to the El Paso and Rio Grande Valley clinics, surmount the low bar of rational-basis review. *Whole Woman's Health v. Lakey*, No. 1:14-CV-284-LY (W.D. Tex. Aug. 1, 2014) (order on motion to dismiss); *Abbott II*, 748 F.3d at 595-96; *Currier*, 2014 WL 3730467 at *4. Despite the finding of a rational-basis, however, this court must determine whether the act places an undue burden before a woman seeking a legal abortion. *Casey*, 505 U.S. at 876-78; *see Gonzales*, 550 U.S. at 156; *see also Abbott II*, 748 F.3d at 597 ("Even though the State articulated rational bases for this law, and even though its purpose

was not impugned, [the plaintiff] could succeed if the effect of the law substantially burdened women's access to abortions in Texas.").

II. DISCUSSION

The parties presented competing evidence at trial, largely through expert-witness declarations and cross examination.[2] The experts' testimony substantially contradicted each other and, predictably, reached opposing conclusions.[3] Such is the nature of expert testimony.

Of more value to the court are the parties' stipulated facts. After September 1, 2014, only seven facilities and a potential eighth will exist in Texas that will not be prevented by the ambulatory-surgical-center requirement from performing abortions. These

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[2] To the extent that the State objects to Plaintiffs' designation of the State's experts' deposition testimony, that objection is overruled.

[3] The credibility and weight the court affords the expert testimony of the State's witnesses Drs. Thompson, Anderson, Kitz, and Uhlenberg is informed by ample evidence that, at a very minimum, Vincent Rue, Ph.D., a non-physician consultant for the State, had considerable editorial and discretionary control over the contents of the experts' reports and declarations. The court finds that, although the experts each testified that they personally held the opinions presented to the court, the level of input exerted by Rue undermines the appearance of objectivity and reliability of the experts' opinions. Further, the court is dismayed by the considerable efforts the State took to obscure Rue's level of involvement with the experts' contributions.

remaining abortion facilities will be located along the I-35 and I-45 corridors; there will be one facility in Austin, two in Dallas, one in Fort Worth, two in Houston, and either one or two in San Antonio. No other abortion facility licensed by the State of Texas currently satisfies the ambulatory-surgical-center requirement of the act; therefore, each of the currently licensed facilities that are not ambulatory surgical centers will be prohibited from performing abortions effective September 1, 2014, without complying with the new requirements. Additionally, there are 433 licensed ambulatory surgical centers in Texas, 336 of which are "considered to be an existing licensed [ambulatory surgical center]" and are apparently either "grandfathered" or enjoying the benefit of a waiver of some or all of the requirements of ambulatory-surgical-center certification due to these centers' earlier licensure dates or compliance with other regulatory schemes. *See* 25 Tex. Admin. Code § 135.51(a). Finally, Reproductive Services of Harlingen has not provided abortion services since the admitting-privileges requirement of the act took effect.

The evidence introduced by the parties at trial further reveals the breadth and effect of House Bill 2. Texas contains nearly 280,000 square miles, is ten percent larger than France, and is home to the second highest number of reproductive-age women in the United States. Such women account for approximately 5.4 million of over 25 million Texas residents. In recent years, the number of abortions reported in Texas has stayed fairly consistent at approximately

15-16% of the reported pregnancy rate, for a total number of approximately 60,000-72,000 legal abortions performed annually.

Before the enactment of House Bill 2, there were more than 40 licensed abortion facilities providing abortion services throughout Texas. That number dropped by almost half leading up to and in the wake of enforcement of the admitting-privileges requirement that went into effect in late-October 2013. Clinics closed throughout the state, leaving no abortion provider in McAllen, Harlingen, Lubbock, Midland, San Angelo, Beaumont, Stafford, Killeen, or Waco. If allowed to go into effect, the act's ambulatory-surgical-center requirement will further reduce the number of licensed abortion-providing facilities to, at most, eight. On September 1, 2014, abortion providers will remain only in Houston, Austin, San Antonio, and the Dallas/Fort Worth metropolitan region. Abortion clinics where doctors were previously able to comply with House Bill 2's admitting-privilege requirement will close in Corpus Christi, San Antonio, Austin, El Paso, Houston, and Dallas.

Between November 1, 2012 and May 1, 2014, the decrease in geographic distribution of abortion facilities has required a woman seeking an abortion to travel increased distance. The number of women of reproductive age living in a county more than 50 miles from a Texas abortion clinic has increased from approximately 800,000 to over 1.6 million; women living in a county more than 100 miles from a provider increased from approximately 400,000 to

1,000,000; women living in a county more than 150 miles from a provider increased from approximately 86,000 to 400,000; and the number of women living in a county more than 200 miles from a provider from approximately 10,000 to 290,000. If not enjoined, the ambulatory-surgical-center requirement will further increase those numbers: after September 1, 2014, approximately 2 million women will live further than 50 miles, 1.3 million further than 100 miles, 900,000 further than 150 miles, and 750,000 further than 200 miles. Even presuming a wide margin of error in these calculations,[4] the inference is straightforward: the cumulative effect of clinic closures and the lessened geographic distribution of abortion services in the wake of the act's two major requirements is that a significant number of the reproductive-age female population of Texas will need to travel considerably further in order to exercise its right to a legal previability abortion.

The ambulatory-surgical-center requirement imposes extensive new standards on abortion facilities by requiring them to meet enhanced standards for new construction. *See* 25 Tex. Admin. Code § 139.40. The requirement applies equally to abortion clinics

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[4] The court finds the estimates provided by the State's expert, Todd Giberson, to be a less reliable assessment of the true impact on the reproductive-age women of Texas because, in part, his calculations were based on distances measured from abortion providers in New Mexico, El Paso, McAllen, and Lubbock. The court finds fewer overall indicia of reliability in Giberson's conclusions than those of Plaintiffs' expert Dr. Grossman.

that only provide medication abortion, even though no surgery or physical intrusion into a woman's body occurs during this procedure. The standards prescribe electrical, heating, ventilation, air conditioning, plumbing, and other physical plant requirements as well as staffing mandates, space utilization, minimum square footage, and parking design. Notably, grandfathering of existing facilities and the granting of waivers from specific requirements is prohibited for abortion providers, although other types of ambulatory-surgical facilities are frequently granted waivers or are grandfathered due to construction dates that predate the newer construction requirements.

According to both sides' experts, the cost of coming into compliance for existing clinics is significant. If a clinic is able to make renovations to comply, those costs will undisputedly approach 1 million dollars and will most likely exceed 1.5 million dollars. Some existing clinics cannot comply due to physical size limitations of their sites. The cost of acquiring land and constructing a new compliant clinic will likely exceed three million dollars. Adapting existing clinics statewide will presumably present similarly high costs and that, although some variance is to be expected, the cost of constructing a new, compliant facility elsewhere in the state is likewise prohibitive. Combined with evidence of operational costs and profit margins associated with operating an abortion facility, the court concludes that few, if any, new compliant abortion facilities will open to meet the demand resulting from existing clinics' closure. Existing clinics, unable

to meet the financial burdens imposed by the new regulatory regime, will close as a result.

The clinic closings attributable to the act's two requirements will undeniably reduce meaningful access to abortion care for women throughout Texas. Even assuming every woman in Texas who wants to obtain an abortion after September 1, 2014, could travel to one of the four metropolitan areas where abortions will still be available, the cumulative results of House Bill 2 are that, at most, eight providers would have to handle the abortion demand of the entire state. Based on historical data pertaining to Texas's average number of abortions, and assuming perfectly equal distribution among the remaining seven or eight providers, this would result in each facility serving between 7,500 and 10,000 patients per year. Accounting for the seasonal variations in pregnancy rates and a slightly unequal distribution of patients at each clinic, it is foreseeable that over 1,200 women per month could be vying for counseling, appointments, and follow-up visits at some of these facilities. That the State suggests that these seven or eight providers could meet the demand of the entire state stretches credulity.

Even if the remaining clinics could meet the demand, the court concludes that the practical impact on Texas women due to the clinics' closure statewide would operate for a significant number of women in Texas just as drastically as a complete ban on abortion. The State argues that the Fifth Circuit has established a *de facto* "safe harbor" of 150 miles and

that no abortion regulation that increases travel distance alone could act as an undue burden on the right to previability abortion. *Abbott II*, 748 F.3d at 598; *Abbott I*, 734 F.3d at 415; *Currier*, 2014 WL 3730467 at *12. But here, the record conclusively establishes that increased travel distances *combine* with practical concerns unique to every woman. These practical concerns include lack of availability of child care, unreliability of transportation, unavailability of appointments at abortion facilities, unavailability of time off from work, immigration status and inability to pass border checkpoints, poverty level, the time and expense involved in traveling long distances, and other, inarticulable psychological obstacles. These factors combine with increased travel distances to establish a *de facto* barrier to obtaining an abortion for a large number of Texas women of reproductive age who *might* choose to seek a legal abortion. The court further concludes that women in the border communities of the Rio Grande Valley and El Paso will be affected most heavily due to longer travel distances (in some cases exceeding 500 miles), higher-than-average poverty levels, and other issues uniquely associated with minority and immigrant populations.

Women living in other areas of Texas will be similarly affected. It is impossible to conclusively measure the individualized factors that act on each woman's decision to seek or forgo an abortion due to the procedure's relative unavailability. Such decisions necessarily "involve personal decisions concerning

not only the meaning of procreation but also human responsibility and respect for it." *Casey*, 505 U.S. at 853. It is also impossible to divine exactly how many women in Texas may be affected by any individual factor or combination of factors to the point of not being able to exercise their right to obtain an abortion.

The act operates in conjunction with Texas's other regulations on abortion, some of which provide significant burdens in their own right. For example, a woman living fewer than 100 miles from a licensed facility is required to wait 24 hours from her initial consultation and make another trip to the facility to complete the procedure. Tex. Health & Safety Code Ann. § 171.012 (West 2014). Even if a woman lives further than 100 miles, she must wait a minimum of two hours from her initial consultation before completing the procedure, adding time to her total time away from work or family responsibilities and complicating the scheduling of the abortion procedure. *Id.* The proverbial "last straw" that encumbers a woman's choice to have an abortion is unknowable to anyone other than that individual woman. It is equally implausible for a plaintiff in a case such as this to conclusively establish factors that act uniformly upon all women across a state as large and diverse as Texas.

A financially disadvantaged woman, now living 50 miles from the nearest abortion clinic may be just as heavily burdened by practical concerns which combine with travel distance, as a woman now living 200

miles away. It is overly simplistic and reductionist to conclude that absolute distances or theoretical travel times measured under ideal circumstances act identically on a population as diverse as Texas's. They simply do not. It is equally unrealistic to conclude that absolute travel distance is the only meaningful obstacle raised by House Bill 2's elimination of more than 30 previously operating abortion facilities. The act's two requirements erect a particularly high barrier for poor, rural, or disadvantaged women throughout Texas, regardless of the absolute distance they may have to travel to obtain an abortion. A woman with means, the freedom and ability to travel, and the desire to obtain an abortion, will always be able to obtain one, in Texas or elsewhere. However, *Roe*'s essential holding guarantees to all women, not just those of means, the right to a previability abortion.

The court concludes that the act's ambulatory-surgical-center requirement, combined with the already in-effect admitting-privileges requirement, creates a brutally effective system of abortion regulation that reduces access to abortion clinics thereby creating a statewide burden for substantial numbers of Texas women. The obstacles erected for these women are more significant than the "incidental effect of making it more difficult or more expensive to procure an abortion." *Casey*, 505 U.S. at 874. The court concludes that the overall lack of practical access to abortion services resulting from clinic closures throughout Texas as a result of House Bill 2 is compelling evidence of a substantial obstacle erected by the act.

The court also concludes that the severity of the burden imposed by both requirements is not balanced by the weight of the interests underlying them. The primary interest proffered for the act's requirements relate to concerns over the health and safety of women seeking abortions in Texas. To the extent that the State argues that the act's requirements are motivated by a legitimate interest in fetal life, the court finds those arguments misplaced. In contrast to the regulations at issue in *Casey*, the act's challenged requirements are solely targeted at regulating the performance of abortions, not the decision to seek an abortion. Here, the only possible gain realized in the interest of fetal life, once a woman has made the decision to have a previability abortion, comes from the ancillary effects of the woman's being unable to obtain an abortion due to the obstacles imposed by the act. The act creates obstacles to previability abortion. It does not counsel against the decision to seek an abortion.

The great weight of the evidence demonstrates that, before the act's passage, abortion in Texas was extremely safe with particularly low rates of serious complications and virtually no deaths occurring on account of the procedure. Giving appropriate weight to the experts' conflicting testimony, the court concludes that concerns over incomplete complication reporting and underestimated complication rates are largely unfounded and are without a reliable basis. Abortion, as regulated by the State before the enactment of House Bill 2, has been shown to be much

safer, in terms of minor and serious complications, than many common medical procedures not subject to such intense regulation and scrutiny. Additionally, risks are not appreciably lowered for patients who undergo abortions at ambulatory surgical centers as compared to nonsurgical-center facilities. Plaintiffs have demonstrated that women will not obtain better care or experience more frequent positive outcomes at an ambulatory surgical center as compared to a previously licensed facility.

Many of the building standards mandated by the act and its implementing rules have such a tangential relationship to patient safety in the context of abortion as to be nearly arbitrary. Furthermore, the court concludes that it is unlikely that the stated goal of the requirement—improving women's health—will actually come to pass. Higher health risks associated with increased delays in seeking early abortion care, risks associated with longer distance automotive travel on traffic-laden highways, and the act's possible connection to observed increases in self-induced abortions almost certainly cancel out any potential health benefit associated with the requirement. The court finds no particularized health risks arising from abortions performed in nonambulatory-surgical-center clinics which countenance the imposition of the ambulatory-surgical-center requirement on the provision of all abortions. The imposition of such requirements is even weaker in the context of medication abortions, where no surgery is involved.

Similarly, the court finds that, as applied to Plaintiff abortion providers in the Rio Grande Valley and El Paso, the interests underlying the admitting-privileges requirement fall short in many of the same ways when compared to the burden the requirement imposes on women in those areas. Evidence related to patient abandonment and potential improved continuity of care in emergency situations is weak in the face of the opposing evidence that such complications are exceedingly rare in Texas, nationwide, and specifically with respect to the Plaintiff abortion providers. Additional objectives proffered for the requirement, such as physician screening and credentialing are not credible due, in part, to evidence that doctors in Texas have been denied privileges for reasons not related to clinical competency. At most, the court finds the credentialing rationale weak and speculative. The court concludes that the heavy burden imposed on the women of West Texas, El Paso, and the Rio Grande Valley by the admitting-privileges requirement is not appropriately balanced by a credible medical or health rationale.

After thorough consideration of the severity of the burdens presented by the act's two requirements, the court concludes that the requirements, independently and when viewed as they operate together, have the ultimate effect of erecting a substantial obstacle for women in Texas who seek to obtain a previability abortion. In other words, the obstacles imposed by the act's ambulatory-surgical-center requirement, with regard to women throughout Texas, and the act's

admitting-privileges requirement combined with the ambulatory-surgical-center requirement, as applied to the Rio Grande Valley and El Paso clinics, are constitutionally impermissible.

An abortion regulation is also violative of a woman's right to an abortion if it was adopted with the purpose of erecting a substantial obstacle to a woman's ability to choose a previability abortion. *Gonzales*, 550 U.S. at 156. Because the act's two requirements have the effect of creating an undue burden, an additional finding that the act was passed with the purpose of erecting a substantial obstacle is not required in order to declare the act unconstitutional. However, the court concludes, after examining the act and the context in which it operates, that the ambulatory-surgical-center requirement was intended to close existing licensed abortion clinics. The requirement's implementing rules specifically deny grandfathering or the granting of waivers to previously licensed abortion providers. This is in contrast to the "frequent" granting of some sort of variance from the standards which occur in the licensing of nearly three-quarters of all licensed ambulatory surgical centers in Texas. Such disparate and arbitrary treatment, at a minimum, suggests that it was the intent of the State to reduce the number of providers licensed to perform abortions, thus creating a substantial obstacle for a woman seeking to access an abortion. This is particularly apparent in light of the dearth of credible evidence supporting the proposition that abortions performed in ambulatory surgical

centers have better patient health outcomes compared to clinics licensed under the previous regime.

Finally, the court finds the suggestion of an impermissible purpose in one of the State's arguments relating to the El Paso clinic. In arguing that the act does not impose an undue burden, the State posits that El Paso and West Texas residents may easily seek previability abortions in neighboring New Mexico, a state without a requirement that abortions be performed in an ambulatory surgical center. *Currier*, 2014 WL 3730467 at *9. If the State's true purpose in enacting the ambulatory-surgical-center requirement is to protect the health and safety of Texas women who seek abortions, it is disingenuous and incompatible with that goal to argue that Texas women can seek abortion care in a state with lesser regulations. If, however, the State's underlying purpose in enacting the requirement was to reduce or eliminate abortion in parts or all of Texas, the State's position is perfectly congruent with such a goal.

House Bill 2's ambulatory-surgical-center requirement burdens Texas women in a way incompatible with the principles of personal freedom and privacy protected by the United States Constitution for the 40 years since *Roe v. Wade*. Through strict regulations that will result in an unprecedented percentage of licensed abortion facilities closing across the state, the requirement will severely limit access to abortion care for untold numbers of women throughout the state. When viewed in the context of the other state-imposed obstacles a woman faces when

seeking an abortion in Texas-including a sonogram requirement, a waiting period, and the reduced number of abortion-performing physicians resulting from the admitting-privilege requirement—the court is firmly convinced that the State has placed unreasonable obstacles in the path of a woman's ability to obtain a previability abortion. These substantial obstacles have reached a tipping point that threatens to "chip away at the private choice shielded by *Roe*," *Stenberg v. Carhart*, 530 U.S. 914, 952 (2000) (Ginsburg, J., concurring), and effectively reduce or eliminate meaningful access to safe abortion care for a significant, but ultimately unknowable, number of women throughout Texas.

Likewise, for women living in the Rio Grande Valley, El Paso, and West Texas, the admitting-privileges and ambulatory-surgical-center requirements, acting in conjunction as applied to the McAllen clinic and the El Paso clinic, impose an undue burden on the right to a previability abortion. The evidence is even stronger that the requirements will affect a substantial number of women living in these communities, and the act's two requirements are unconstitutional as applied to the Plaintiff abortion providers in those two cities. Finally, the court concludes that the ambulatory-surgical-center requirement imposes an undue burden specifically as applied to the provision of medication abortions, where any medical justification for the requirement is at its absolute weakest in comparison with the heavy burden it imposes.

In order to fashion a remedy consistent with the conclusions reached above, the court "must consider the proper place of [the act's] comprehensive and careful severability provision." *Abbott II*, 748 F.3d at 589. "Federal courts are bound to apply state law severability provisions [and] must preserve the valid scope of the provision to the greatest extent possible" even when considering facial invalidation of a statute. *Id.* The State urges that the Texas Legislature expressed its intent that "every application of this statute to every individual woman shall be severable from each other." Act § 1(b). The State further argues that the act's severability clause, which states, in part:

> All constitutionally valid applications of this Act shall be severed from any applications that a court finds to be invalid, leaving the valid applications in force, because it is the legislature's intent and priority that the valid applications be allowed to stand alone. Even if a reviewing court finds a provision of this Act to impose an undue burden in a large or substantial fraction of relevant cases, the applications that do not present an undue burden shall be severed from the remaining provisions and shall remain in force, and shall be treated as if the legislature had enacted a statute limited to the persons, group of persons, or circumstances for which the statute's application does not present an undue burden.

Act § 10(b), operates to preclude a facial challenge to the act under existing abortion-regulation jurisprudence.

This plainly cannot be so. A state's legislature cannot purport to act to abrogate the rights guaranteed by the United States Constitution. The court further notes the sheer impossibility of severing "every application of this statute to every individual woman." However, because this court is bound to apply the severability clause contained in the act when crafting a remedy for the successful facial challenge to the ambulatory-surgical-center requirement, the court will leave in place all applications for which the statute's application does not present an undue burden. The court concludes that the ambulatory-surgical-center requirement does not act as an undue burden on Texas women when applied to the currently licensed ambulatory-surgical-center abortion providers in Texas. The requirement also does not act as an undue burden on new abortion providers that begin offering abortion services after September 1, 2014, and which were not previously licensed abortion providers. In all other applications, the court finds that the ambulatory-surgical-center requirement imposes an undue burden on Texas women of reproductive age.

III. CONCLUSION

Examining separately the ambulatory-surgical-center and admitting-privileges requirements of House Bill 2, the court will render a final judgment:

(1) Declaring that the ambulatory-surgical-center requirement is unconstitutional because it imposes an undue burden on the right of women throughout Texas to seek a previability abortion. The court will enjoin enforcement of the provision consistent with the act's severability clause.

(2) The court will render a final judgment that the admitting-privileges requirement, as applied to the Plaintiff McAllen and El Paso clinics, is unconstitutional because it, in conjunction with the ambulatory-surgical-center requirement, imposes an undue burden on the right of women in the Rio Grande Valley, El Paso, and West Texas to seek a previability abortion. The admitting-privilege-requirement will be enjoined as applied to the McAllen and El Paso clinics.

(3) The court will render a final judgment that the act's ambulatory-surgical-center requirement, as applied to the provision of medication abortions, is unconstitutional because it imposes an undue burden on women seeking a previability abortion. The court will therefore enjoin the ambulatory-surgical-center requirement as applied to the provision of medication abortions.

However, when the two provisions are considered together, they create a scheme that effects the closing of almost all abortion clinics in Texas that were operating legally in the fall of 2013. Thus, the overall effect of the provisions is to create an impermissible obstacle as applied to all women seeking a pre-viability abortion. The court will thus enjoin the enforcement of both provisions on the basis that they act together to create an undue burden on a woman seeking a previability abortion by restricting access to previously available legal facilities.

SIGNED this 29th day of August, 2014.

/s/ Lee Yeakel
LEE YEAKEL
UNITED STATES
DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

WHOLE WOMAN'S HEALTH, AUSTIN WOMAN'S HEALTH CENTER, KILLEEN WOMAN'S HEALTH CENTER, NOVA HEALTH SYSTEMS D/B/A REPRODUCTIVE SERVICES, AND SHERWOOD C. LYNN, JR., M.D., PAMELA J. RICHTER, D.O., AND LENDOL L. DAVIS, M.D., EACH ON BEHALF OF THEMSELVES AND THEIR PATIENTS, PLAINTIFFS,	§	CAUSE NO. 1:14-CV-284-LY
V.	§	
DAVID LAKEY, M.D., COMMISSIONER OF THE TEXAS DEPARTMENT OF STATE HEALTH SERVICES, IN HIS OFFICIAL CAPACITY, AND MARI ROBINSON, EXECUTIVE DIRECTOR OF THE TEXAS MEDICAL BOARD, IN HER OFFICIAL CAPACITY, DEFENDANTS.	§	

FINAL JUDGMENT

(Filed Aug. 29, 2014)

Before the court is the above-styled and numbered cause. On May 12, 2014, upon joint motion of

the parties, the court dismissed from this action Defendants Travis County Attorney David Escamilla, El Paso District Attorney Jaime Esparza, Hidalgo County Criminal District Attorney Rene Guerra, Bell County Attorney James E. Nichols, Bexar County Criminal District Attorney Susan Reed, Tarrant County Criminal District Attorney Joe Shannon, Jr., and Dallas County Criminal District Attorney Craig Watkins, each in their official capacities, and their employees, agents, and successors. On August 1, 2014, the court dismissed Plaintiffs Whole Woman's Health, Austin Woman's Health Center, Killeen Woman's Health Center, Nova Health Systems d/b/a Reproductive Services, and Sherwood C. Lynn, Jr., M.D., Pamela J. Richter, D.O., and Lendol L. Davis, M.D., on behalf of themselves and their patients's claims alleging federal equal-protection violations, improper delegation of lawmaking authority, and arbitrary and unreasonable state action against Defendants David Lakey, M.D., Commissioner of the Texas Department of State Health Services, in his official capacity, and Mari Robinson, Executive Director of the Texas Medical Board, in her official capacity (together the "State"). On this date by Memorandum Opinion Incorporating Findings of Fact and Conclusions of Law, the court found and concluded that the ambulatory-surgical-center requirement of the Act of July 12, 2013, 83rd Leg., 2nd C.S., ch. 1, 2013 Tex. Gen. Laws 4795; ("House Bill 2") (codified at Tex. Health & Safety Code Ann. §§ 171.0031, 245.010(a) (West Supp. 2014) is unconstitutional, that the admitting-privileges and ambulatory-surgical-center

requirements of House Bill 2 as applied to Plaintiffs Whole Woman's Health clinic in McAllen, Texas, and Nova Health Systems's clinic in El Paso, Texas, are unconstitutional, that the ambulatory-surgical-center requirement of House Bill 2, as applied to medication abortions, is unconstitutional, and that the provisions considered together create an impermissible obstacle as applied to all women seeking a previability abortion. As nothing remains for the court to resolve, the court renders the following final judgment pursuant to Federal Rule of Civil Procedure 58.

THE COURT DECLARES that the portion of the Texas Health and Safety Code, Section 245.010(a), "On and after September 1, 2014, the minimum standards for an abortion facility must be equivalent to the minimum standards adopted under Section 243.010 for ambulatory surgical centers" is unconstitutional:

1. As to all abortion facilities in the State, with the exception of

   (a) abortion facilities currently licensed and meeting the minimum standards adopted under the Texas Health and Safety Code, Section 243.010 for ambulatory surgical centers, and

   (b) abortion facilities commencing operation after September 1, 2014, and which were not previously licensed abortion facilities under the Texas Health and Safety Code, Section 245.

2. As applied to the provision of medical abortion, as defined in Texas Health and Safety Code, Section 171.061.

THE COURT FURTHER DECLARES that the portion of Texas Health and Safety Code, Section 171.0031(a)(1) is unconstitutional as applied to Plaintiffs Whole Woman's Health and Sherwood Lynn with respect to the operation of an abortion facility in McAllen, Texas, and Plaintiffs Nova Health Systems and Pamela Richter with respect to the operation of an abortion facility in El Paso, Texas.

THE COURT FURTHER DECLARES that the two portions of Texas Health and Safety Code, Sections 245.010(a) and 171.0031(a)(1), create an impermissible obstacle as applied to all women seeking a previability abortion.

IT IS ORDERED that the State, its agents, employees, and any other persons or entities acting on its behalf are enjoined from enforcing the above-listed portions of sections of the Texas Health and Safety Code to the extent stated herein, including enforcing any criminal and administrative penalties against any person accused of violating any provision of the Texas Health and Safety Code declared unconstitutional by this final judgment.

Any claim for attorney's fees incurred in this action will be determined post judgment and pursuant to Rule CV-7(j), of the Local Rules of the United States District Court for the Western District of Texas.

IT IS FURTHER ORDERED that Plaintiffs recover their costs of court.

IT IS FURTHER ORDERED, except as expressly provided herein, all other relief requested by any party is **DENIED**.

SIGNED this 29th day of August, 2014

/s/ Lee Yeakel
LEE YEAKEL
UNITED STATES DISTRICT JUDGE

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

WHOLE WOMAN'S HEALTH, AUSTIN WOMAN'S HEALTH CENTER, KILLEEN WOMAN'S HEALTH CENTER, NOVA HEALTH SYSTEMS D/B/A REPRODUCTIVE SERVICES, AND SHERWOOD C. LYNN, JR., M.D., PAMELA J. RICHTER, D.O., AND LENDOL L. DAVIS, M.D. (ON BEHALF OF THEMSELVES AND THEIR PATIENTS),	§	CAUSE NO. 1:14-CV-284-LY
PLAINTIFFS,	§	
V.	§	
DAVID LAKEY, M.D. AND MARI ROBINSON (IN THEIR OFFICIAL CAPACITIES),	§	
DEFENDANTS.	§	

ORDER

(Filed Aug. 1, 2014)

Before the court in the above-styled and numbered cause are Defendants' Motion to Dismiss filed May 2, 2014 (Clerk's Doc. No. 48), Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion

to Dismiss filed May 19, 2014 (Clerk's Doc. No. 57), and Defendants' Reply Brief Supporting Defendants' Motion to Dismiss filed May 29, 2014 (Clerk's Doc. No. 63). Defendants (hereafter "the State") move to dismiss Plaintiffs' complaint for failure to state a claim upon which relief may be granted. *See* Fed. R. Civ. P. 12(b)(6). Having reviewed the motion, response, reply, pleadings, and applicable law, the court will grant in part and deny in part the State's motion.

I. Background

Plaintiffs Whole Woman's Health, Austin Woman's Health Center, Killeen Woman's Health Center, Nova Health Systems d/b/a Reproductive Services, Dr. Sherwood Lynn, Jr., Dr. Pamela Richter, and Dr. Lendol Davis (collectively "Plaintiffs") bring this action on behalf of themselves and their patients. Plaintiffs seek declaratory and injunctive relief relating to two requirements of Texas law imposed by Texas House Bill No. 2 ("House Bill 2" or "the Act") and the Act's implementing regulations. Act of July 12, 2013, 83rd Leg., 2nd C.S., ch. 1, Tex. Gen. Laws; 38 Tex. Reg. 9577-93 (adoption of proposed rules). The Act's "admitting-privileges requirement" provides that "[a] physician performing or inducing an abortion must, on the date the abortion is performed or induced, have active admitting privileges at a hospital that is located not further than 30 miles from the location at which the abortion is performed or induced." Act, § 2 (codified at Tex. Health & Safety Code § 171.0031); 25 Tex. Admin Code §§ 139.539(c),

139.56(a). The "ambulatory-surgical-center requirement" provides, in relevant part, that by September 1, 2014, "the minimum standards for an abortion facility must be equivalent to the minimum standards adopted under [Texas Health & Safety Code] Section 243.010 for ambulatory surgical centers." Act, § 4 (codified at Tex. Health & Safety Code § 245.010(a)); 25 Tex. Admin Code § 139.40.

The admitting-privileges requirement was the subject of a pre-enforcement facial challenge brought by several abortion providers, including some of the plaintiffs in this case. This court permanently enjoined the requirement on October 28, 2013. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 951 F.Supp.2d 891 (W.D. Tex. 2013). The United States Court of Appeals for the Fifth Circuit stayed the injunction and ultimately reversed, in part, this court's judgment, finding that the admitting-privileges requirement is constitutional on its face. *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583 (5th Cir. 2014).

In the present case, Whole Woman's Health and Dr. Lynn challenge the admitting-privileges requirement as applied to the abortion facility operated by Whole Woman's Health in McAllen, Texas (the "McAllen clinic"). Nova Health Systems and Dr. Richter challenge the admitting-privileges requirement as applied to the abortion facility operated by Nova Health Systems in El Paso, Texas (the "El Paso clinic"). All plaintiffs challenge the ambulatory-surgical-center requirement on its face, Whole Woman's Health and

Dr. Lynn challenge the ambulatory-surgical-center requirement as applied to the McAllen Clinic, and Nova Health Systems and Dr. Richter challenge the ambulatory-surgical-center requirement as applied to the El Paso Clinic.

Specifically, Plaintiffs allege that: (1) as applied to the McAllen and El Paso clinics, the admitting-privileges requirement violates the Due Process Clause of the Fourteenth Amendment with regard to women in the Rio Grande Valley and West Texas; (2) as applied to the McAllen and El Paso clinics, the admitting-privileges requirement violates the Equal Protection Clause of the Fourteenth Amendment with regard to the Plaintiffs and their patients in the Rio Grande Valley and West Texas; (3) as applied to the McAllen and El Paso Clinics the admitting-privileges requirement improperly delegates lawmaking authority in violation of the Due Process Clause of the Fourteenth Amendment; (4) as applied to the McAllen and El Paso clinics and the provision of medical abortion at those clinics, the admitting-privileges requirement constitutes arbitrary and unreasonable State action in violation of the Due Process Clause of the Fourteenth Amendment; (5) the ambulatory-surgical-center requirement with regard to all women in Texas and, as applied to the McAllen and El Paso clinics specifically, with regard to women in the Rio Grande Valley and West Texas, violates the Due Process Clause of the Fourteenth Amendment; (6) the ambulatory-surgical-center requirement violates the Equal Protection Clause of the Fourteenth

Amendment with regard to the Plaintiffs and their patients; and (7) the ambulatory-surgical-center requirement, on its face and as applied to the provision of medical abortion, constitutes arbitrary and unreasonable State action in violation of the Due Process Clause of the Fourteenth Amendment.

The State argues that Plaintiffs' complaint fails and should be dismissed. Specifically, the State argues that each of the Plaintiffs' challenges to the admitting-privileges requirement and the ambulatory-surgical-center requirement are barred by *res judicata*. The State also argues that the Fifth Circuit's ruling in *Planned Parenthood of Greater Texas* forecloses the McAllen and El Paso clinics' as-applied Due Process challenges to the admitting-privilege requirement. 748 F.3d 583 (5th Cir. 2014). The State further asserts that the Plaintiffs' Equal Protection and Unlawful Delegation claims fail due to binding precedent. The State also argues that the "arbitrary and unreasonable state action" challenges in Plaintiffs' complaint fail because there is no constitutional right to be free from "arbitrary and unreasonable state action." Instead, the State asserts, *Planned Parenthood of Greater Texas* establishes that the admitting-privileges and ambulatory-surgical-center requirements withstand rational basis review. Additionally, the State argues that the Plaintiffs' facial challenge to the ambulatory-surgical-center requirement must be dismissed both because the Plaintiffs lack third-party standing to assert other providers' patients' rights and in light of the Act's severability

clause. Finally, the State argues that the Plaintiffs cannot assert third-party rights under Title 42, United States Code Section 1983 or the Declaratory Judgment Act.

II. Legal Standard

The Federal Rules of Civil Procedure allow for dismissal of an action "for failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). When evaluating a motion to dismiss, the court must liberally construe the complaint in favor of the plaintiff, and all facts pleaded must be taken as true. *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993); *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996). A pleading need only contain a "short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8, but the standard demands more than "a formulaic recitation of the elements of a cause of action," or "naked assertion[s]" devoid of "further factual enhancement." *Bell Atl. v. Twombly*, 550 U.S. 544, 555-57 (2007). Rather, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Id.* at 570. The court considers the complaint in its entirety, together with "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Funk v. Stryker Corp.*, 631 F.3d 777, 783 (5th Cir. 2011) (quoting *Tellabs Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007)).

The plausibility standard is not a "probability requirement," but does impose a standard higher than "a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Although "a court must accept as true all of the allegations contained in a complaint," that tenet is inapplicable to legal conclusions, and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* "Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679. Thus, in considering a motion to dismiss, the court must initially identify pleadings that are no more than legal conclusions not entitled to the assumption of truth, then assume the veracity of well-pleaded factual allegations and determine whether those allegations plausibly give rise to an entitlement to relief. If not, "the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Id.* (quoting Fed. R. Civ. P. 8(a)(2)).

III. Discussion

A. Claim Preclusion

"Claim preclusion, or *res judicata*, bars the litigation of claims that either have been litigated or should have been raised in an earlier suit." *In re Southmark Corp.*, 163 F.3d 925, 935 (5th Cir. 1999). The doctrine "prevents litigation of all grounds for, or

defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding." *Brown v. Felsen*, 442 U.S. 127, 131 (1979). In the Fifth Circuit, the test for *res judicata* has four elements: (1) the parties are identical or in privity; (2) the judgment in the prior action was rendered by a court of competent jurisdiction; (3) the prior action was concluded by a final judgment on the merits; and (4) the same claim or cause of action was involved in both actions. *Petro-Hunt, L.L.C. v. United States*, 365 F.3d 385, 395 (5th Cir. 2004). The only point of contention applicable to this case concerns the final element.

The Fifth Circuit has adopted the transactional test of Section 24 of the Restatement (Second) of Judgments to determine whether two suits involve the same claim or cause of action. *Id*; *see also Southmark Properties v. Charles House Corp.*, 742 F.2d 862 (5th Cir. 1984). Under the Restatement, what constitutes a "transaction" is "to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." Restatement (Second) of Judgments § 24. The Restatement also provides that

> [m]aterial operative facts occurring after the decision of an action with respect to the same subject matter may in themselves, or taken in conjunction with the antecedent facts,

> comprise a transaction which may be made the basis of a second action not precluded by the first. . . . Where important human values—such as the lawfulness of a continuing personal disability or restraint—are at stake, even a slight change of circumstances may afford a sufficient basis for concluding that a second action may be brought.

Id. at comment (f). Underlying the pragmatic standard "is the need to strike a delicate balance between, on the one hand, the interests of the defendant and of the courts in bringing litigation to a close and, on the other, the interest of the plaintiff in the vindication of a just claim." *Id.* at comment (b).

The State alleges that the Plaintiffs are barred from all of their claims by *Planned Parenthood of Greater Texas*, because the claims "arise from the same transaction litigated in the earlier proceeding." The State also argues that all claims asserted in this lawsuit could have been brought in that proceeding. The court disagrees. The doctrine of *res judicata* "is to be invoked only after careful inquiry." *Felsen*, 442 U.S. at 132. Giving appropriate weight to the factors outlined in the Restatement and the Restatement's comments, the court strikes the balance in favor of Plaintiffs.

Construing the pleaded facts in the light most favorable to Plaintiffs, Plaintiffs' as-applied challenge to the admitting-privileges requirement relies on facts that occurred after judgment was rendered in the previous lawsuit and that were not considered by

either this court or the appellate court. *Planned Parenthood of Greater Texas*, 748 F.3d at 599 n.14 ("To the extent that the State and [Plaintiffs] rely on developments since the conclusion of the bench trial [the court did] not consider any arguments based on those facts, nor [did the court] rely on any facts asserted in amicus briefs."). In particular, it was not known in late October 2013 that the McAllen and El Paso clinics' physicians would ultimately be unable to obtain admitting privileges despite efforts to secure them. Neither was known the impact of that reality on the clinics' patients' access to previability abortions. The McAllen clinic physicians did not receive notice that they had been denied admitting-privileges until November or December 2013, after the final judgment in *Planned Parenthood of Greater Texas*. The El Paso clinic physician received notice that her temporary privileges would not be extended in February 2014. Plaintiffs plead additional facts that could not have been known at the time of the prior judgment which, if assumed to be true, tend to demonstrate the effect of the admitting-privileges requirement as applied to patients of the clinics. For example, Plaintiffs state that after abortion services ceased in McAllen, health professionals observed an increase in patients from the Rio Grande Valley who had attempted self-abortion without the assistance of a physician.

Plaintiffs' claims regarding the ambulatory-surgical-center requirement are likewise not precluded by *res judiciata*. Regulations implementing the

ambulatory-surgical-center requirement were not finalized until late December 2013. 38 Tex. Reg. 9577-93 (Dec. 27, 2013). The Plaintiffs could not have known the extent of the enforcement nor the nature of the regulations governing the ambulatory-surgical-center requirement until after judgment in *Planned Parenthood of Greater Texas*. Moreover, despite being passed as part of an omnibus act, enforcement of the ambulatory-surgical-center requirement is distinct from the admitting-privileges requirement and is not part of the same "transaction, or series of connected transactions." *Petro-Hunt, L.L.C.*, 365 F.3d at 395. As the Plaintiffs' argue, "the [ambulatory-surgical-center] requirement operates independently from the other requirements in the Act, as evidenced by [the requirement's] separate effective date and the need for implementing regulations to give it effect."

In sum, Plaintiffs' claims in this case are not precluded by *res judicata* because those claims are not "the same claim or cause of action" that was brought in the earlier lawsuit. *Id.* In a case such as this, "where important human values are at stake," the pleaded facts afford the court "a sufficient basis for concluding that a second action may be brought." Restatement (Second) of Judgments § 24, comment (f).

B. Undue-Burden Challenges to the Admitting-Privileges Requirement

The State argues that *Planned Parenthood of Greater Texas* also forecloses the Plaintiffs' undue-burden challenges to the admitting-privileges requirement. Specifically, the State claims that the court's conclusion that "an increase of travel of less than 150 miles for some women is not an undue burden under *Casey*" settles the question with regard to the McAllen clinic as a matter of law. 748 F.3d at 598. The State argues that Plaintiffs' claims are thus collaterally estopped. The State further asserts that the facts alleged in Plaintiffs' undue-burden challenge with regard to the El Paso clinic are "not plausible" and cannot sustain a claim for relief.

Collateral estoppel prevents a party from relitigating an issue raised in an earlier action if (1) the issue at stake is identical to the one involved in the earlier action; (2) the issue was actually litigated in the prior action; and (3) the determination of the issue in the prior action was a necessary part of the judgment in that action. *Petro-Hunt, L.L.C.*, 365 F.3d at 397 "Collateral estoppel does not preclude litigation of an issue unless both the facts and the legal standard used to assess them are the same in both proceedings." *Copeland v. Merrill Lynch & Co., Inc.*, 47 F.3d 1415, 1422 (5th Cir. 1995).

In *Planned Parenthood of Greater Texas*, this court and the Fifth Circuit considered, in part, the merits of a total facial invalidation of the Act's

admitting-privileges requirement. The Fifth Circuit, in examining the effect of presumed clinic closures resulting from the admitting-privileges requirement, considered the statute in context of women throughout Texas. *Planned Parenthood of Greater Texas*, 748 F.3d at 600 ("[The record] demonstrates that if the admitting-privileges regulation burdens abortion access by diminishing the number of doctors who will perform abortions and requiring women to travel farther, the burden does not fall on the vast majority of Texas women seeking abortions. Put otherwise, the regulation will not affect a significant (much less "large") fraction of such women, and it imposes on other women in Texas less of a burden than the waiting-period provision upheld in *Casey*."). In other words, women in the Rio Grande Valley who may have to travel distances up to 150 miles do not constitute a large enough fraction of potential previability abortion patients in Texas to justify invalidating the statute under *Casey*. *Planned Parenthood of Southeast Pa. v. Casey*, 505 U.S. 833, 895 (1992). However, neither court considered the question of an allegedly undue burden resulting from the application of the admitting-privileges requirement to a specific clinic or patient population. The Plaintiffs' undue-burden claims as applied to the McAllen clinic survive the State's motion to dismiss.

Similarly, the El Paso clinic's as-applied challenge was not previously considered by this court and is not precluded by *Planned Parenthood of Greater Texas*. The court does not find that Plaintiffs' alleged

claims are implausible, nor does the court find merit in the State's argument that women in West Texas can travel to New Mexico to obtain abortion services. *See Jackson Women's Health Organization v. Currier*, 13-60599, ___ F.3d ___, 2014 WL 3730467, *10 (5th Cir. July 29, 2014) (holding that availability of abortion services in neighboring state is not proper consideration for purposes of undue-burden analysis). The court concludes that Plaintiffs' undue-burden claims as applied to the El Paso clinic are plausible and survive the State's motion to dismiss.

C. Equal Protection Claims

The State argues that Plaintiffs' Equal Protection challenges to the ambulatory-surgical-center requirement and the admitting-privileges requirement fail because "it has long been settled that States may impose abortion-specific regulations without extending those requirements to other medical procedures." Further, the State asserts, the requirements do not draw any classification that triggers heightened scrutiny. The State also argues that the Fifth Circuit held that the admitting-privileges requirement survives rational-basis review. *Planned Parenthood of Greater Texas*, 748 F.3d at 596; *see also Jackson Women's Health Organization*, 2014 WL 3730467 at *5.

Plaintiffs' arguments to the contrary are unavailing. There is no constitutional requirement that a statutory distinction be "directly related" to the

State's interest. *See Heller v. Doe*, 509 U.S. 312, 321 (1993) ("[C]ourts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends."). Specifically, when analyzing the rational basis of the Act, the Fifth Circuit noted that "[t]he fact that reasonable minds can disagree on legislation, moreover, suffices to prove that the law has a rational basis." *Planned Parenthood of Greater Texas*, 748 F.3d at 594. Despite Plaintiffs' attempts to distinguish it, the Supreme Court's approval of regulations that apply only to abortion procedures and that are not equally applied to other medical procedures informs this court's decision. *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 67 (1976). For these reasons, Plaintiffs' Equal Protection claims with regard to both requirements cannot succeed and will be dismissed.

D. Unlawful-Delegation Claims

The State asserts that the Fifth Circuit addressed the question of unlawful delegation with regard to the admitting-privileges requirement when it stated:

> The requirement that physicians performing abortions obtain surgical privileges, which involves the independent action of a public or private hospital, poses no more significant threat to plaintiffs' due process rights than the requirement that those performing abortions be licensed physicians, which involves

> the independent action of a medical licensing board.

Planned Parenthood of Greater Texas, 748 F.3d at 600. Plaintiffs' arguments that the requirement could be proper in some circumstances but not all circumstances does not persuade the court or surmount the plausibility standard. Plaintiffs cannot succeed on this claim in the face of the Fifth Circuit's *Planned Parenthood of Greater Texas* holding. Plaintiffs' unlawful-delegation claims will be dismissed.

E. "Arbitrary and Unreasonable State Action" Claims

Although not clear from the pleadings, the court construes Plaintiffs' claims involving "arbitrary and unreasonable state action" to be claims relating to the rationality of both requirements—the admitting-privileges requirement as applied to the McAllen and El Paso Clinics and the ambulatory-surgical-center requirement on its face and as applied to the two clinics. The claims also encompass the rationality of both requirements on the provision of medical abortions. Plaintiffs do not direct the court to any precedent that guarantees a specific constitutional right to be free from arbitrary and unreasonable state action, nor do they respond directly to the State's arguments that there is no such right. The court concludes that the Plaintiffs' claims contest the rational basis of the requirements contained in the Act.

There is a rational connection between the admitting-privileges requirement and the State's goals. *Planned Parenthood of Greater Texas*, 748 F.3d at 594 ("[T]he State's articulation of rational legislative objectives . . . easily supplied a connection between the admitting-privileges rule and the desirable protection of abortion patients' health."). The same analysis applies to legislative objectives with regard to the ambulatory-surgical-center requirement and the State's purported interests in enacting the requirement. In light of *Planned Parenthood of Greater Texas*, it is not plausible that any facts, construed in the light most favorable to Plaintiffs, would result in a finding that either requirement fails rational-basis review, either as-applied or on its face. For this reason, Plaintiffs' claims involving "arbitrary and unreasonable state action" will be dismissed.

F. Ambulatory-Surgical-Center Requirement Claims

The State maintains that the Act's severability clause requires Plaintiffs' facial challenge to the ambulatory-surgical-center requirement to be "rejected out of hand." It is well settled that "[f]ederal courts are bound to apply state law severability provisions." *Planned Parenthood of Greater Texas*, 748 F.3d at 589. However, the existence of such a provision does not preclude a plaintiff from challenging a state law's constitutionality on its face. *Id.* ("Even *when considering facial invalidation of a state statute*, the court must preserve the valid scope of the

provision to the greatest extent possible.") (emphasis added). To conclude otherwise would strike at the heart of this nation's principles of constitutional federalism. The question of appropriate remedy comes at the conclusion of the trial on the merits. The court will not reject "out of hand" Plaintiffs' facial challenge.

The State also asserts that Plaintiffs lack third-party standing to assert the rights of other providers' patients. In light of long-standing precedent tacitly acknowledging third-party standing for abortion providers who challenge the validity of abortion regulations, and the Fifth Circuit's finding third-party standing in *Planned Parenthood of Greater Texas*, this court concludes that Plaintiffs here have third-party standing to bring a facial challenge to the ambulatory-surgical-center requirement. *Id.*

Finally, the State argues that Plaintiffs' undue-burden claims, both facial and as-applied, cannot be sustained because Title 42 United States Code, Section 1983 and the Declaratory Judgment Act only extend to litigants who assert their own rights. That many challenges to abortion regulations have been successfully pursued under Section 1983 does not deter the State's position. *See, e.g. Planned Parenthood of Se. Pa. v. Casey*, 744 F. Supp. 1323 (E.D. Pa. 1990); *Planned Parenthood of Greater Texas*, 951 F. Supp. 2d 891 (W.D. Tex. 2013). This court finds the State's argument unpersuasive and will not adopt its reading of Section 1983 or the Declaratory Judgment Act.

III. Conclusion

For the reasons discussed above, several of Plaintiffs' claims survive the State's motion to dismiss and several do not. Accordingly,

IT IS HEREBY ORDERED that the State Defendants' Motion to Dismiss (Clerk's Doc. No. 48) is **GRANTED IN PART** to the following extent: (1) Plaintiffs' challenges to the admitting-privileges requirement and the ambulatory-surgical-center requirement under the Equal Protection Clause of the Fourteenth Amendment are **DISMISSED**; (2) Plaintiffs' improper delegation of lawmaking authority claims are **DISMISSED**; (3) Plaintiffs' claims that both requirements constitute arbitrary and unreasonable state action are **DISMISSED**. In all other respects, the State's motion is **DENIED**.

Remaining for trial are the Plaintiffs' claims that (1) the admitting-privileges requirement, as-applied to the McAllen and El Paso clinics, violates the Due Process Clause of the Fourteenth Amendment with regard to women in the Rio Grande Valley and West Texas, and (2) the ambulatory-surgical-center requirement, facially in regard to all Texas women and, as applied to the McAllen and El Paso clinics specifically, in regard to women in the Rio Grande Valley and West Texas, violates the Due Process Clause of the Fourteenth Amendment.

SIGNED this 1st day of August, 2014

/s/ Lee Yeakel
LEE YEAKEL
UNITED STATES
DISTRICT JUDGE

APPENDIX G

Amendment XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX H

H.B. No. 2

AN ACT

relating to the regulation of abortion procedures, providers, and facilities; providing penalties.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS: SECTION 1. (a) The findings indicate that:

(1) substantial medical evidence recognizes that an unborn child is capable of experiencing pain by not later than 20 weeks after fertilization;

(2) the state has a compelling state interest in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that these children are capable of feeling pain;

(3) the compelling state interest in protecting the lives of unborn children from the stage at which substantial medical evidence indicates that an unborn child is capable of feeling pain is intended to be separate from and independent of the compelling state interest in protecting the lives of unborn children from the stage of viability, and neither state interest is intended to replace the other; and

(4) restricting elective abortions at or later than 20 weeks post-fertilization, as provided by this Act, does not impose an undue burden or a substantial obstacle on a woman's ability to have an abortion because:

(A) the woman has adequate time to decide whether to have an abortion in the first 20 weeks after fertilization; and

(B) this Act does not apply to abortions that are necessary to avert the death or substantial and irreversible physical impairment of a major bodily function of the pregnant woman or abortions that are performed on unborn children with severe fetal abnormalities.

(b) The legislature intends that every application of this statute to every individual woman shall be severable from each other. In the unexpected event that the application of this statute is found to impose an impermissible undue burden on any pregnant woman or group of pregnant women, the application of the statute to those women shall be severed from the remaining applications of the statute that do not impose an undue burden, and those remaining applications shall remain in force and unaffected, consistent with Section 10 of this Act.

SECTION 2. Subchapter A, Chapter 171, Health and Safety Code, is amended by adding Section 171.0031 to read as follows:

Sec. 171.0031. REQUIREMENTS OF PHYSICIAN; OFFENSE. (a) A physician performing or inducing an abortion:

(1) must, on the date the abortion is performed or induced, have active admitting privileges at a hospital that:

(A) is located not further than 30 miles from the location at which the abortion is performed or induced; and

(B) provides obstetrical or gynecological health care services; and

(2) shall provide the pregnant woman with:

(A) a telephone number by which the pregnant woman may reach the physician, or other health care personnel employed by the physician or by the facility at which the abortion was performed or induced with access to the woman's relevant medical records, 24 hours a day to request assistance for any complications that arise from the performance or induction of the abortion or ask health-related questions regarding the abortion; and

(B) the name and telephone number of the nearest hospital to the home of the pregnant woman at which an emergency arising from the abortion would be treated.

(b) A physician who violates Subsection (a) commits an offense. An offense under this section is a Class A misdemeanor punishable by a fine only, not to exceed $4,000.

SECTION 3. Chapter 171, Health and Safety Code, is amended by adding Subchapters C and D to read as follows:

SUBCHAPTER C. ABORTION PROHIBITED AT OR AFTER 20 WEEKS POST-FERTILIZATION

Sec. 171.041. SHORT TITLE. This subchapter may be cited as the Preborn Pain Act.

Sec. 171.042. DEFINITIONS. In this subchapter:

(1) "Post-fertilization age" means the age of the unborn child as calculated from the fusion of a human spermatozoon with a human ovum.

(2) "Severe fetal abnormality" has the meaning assigned by Section 285.202.

Sec. 171.043. DETERMINATION OF POST-FERTILIZATION AGE REQUIRED. Except as otherwise provided by Section 171.046, a physician may not perform or induce or attempt to perform or induce an abortion without, prior to the procedure:

(1) making a determination of the probable post-fertilization age of the unborn child; or

(2) possessing and relying on a determination of the probable post-fertilization age of the unborn child made by another physician.

Sec. 171.044. ABORTION OF UNBORN CHILD OF 20 OR MORE WEEKS POST-FERTILIZATION AGE PROHIBITED. Except as otherwise provided by Section 171.046, a person may not perform or induce or attempt to perform or induce an abortion on a woman if it has been determined, by the physician performing, inducing, or attempting to perform or induce the

abortion or by another physician on whose determination that physician relies, that the probable post-fertilization age of the unborn child is 20 or more weeks.

Sec. 171.045. METHOD OF ABORTION. (a) This section applies only to an abortion authorized under Section 171.046(a)(1) or (2) in which:

(1) the probable post-fertilization age of the unborn child is 20 or more weeks; or

(2) the probable post-fertilization age of the unborn child has not been determined but could reasonably be 20 or more weeks.

(b) Except as otherwise provided by Section 171.046(a)(3), a physician performing an abortion under Subsection (a) shall terminate the pregnancy in the manner that, in the physician's reasonable medical judgment, provides the best opportunity for the unborn child to survive.

Sec. 171.046. EXCEPTIONS. (a) The prohibitions and requirements under Sections 171.043, 171.044, and 171.045(b) do not apply to an abortion performed if there exists a condition that, in the physician's reasonable medical judgment, so complicates the medical condition of the woman that, to avert the woman's death or a serious risk of substantial and irreversible physical impairment of a major bodily function, other than a psychological condition, it necessitates, as applicable:

(1) the immediate abortion of her pregnancy without the delay necessary to determine the probable post-fertilization age of the unborn child;

(2) the abortion of her pregnancy even though the post-fertilization age of the unborn child is 20 or more weeks; or

(3) the use of a method of abortion other than a method described by Section 171.045(b).

(b) A physician may not take an action authorized under Subsection (a) if the risk of death or a substantial and irreversible physical impairment of a major bodily function arises from a claim or diagnosis that the woman will engage in conduct that may result in her death or in substantial and irreversible physical impairment of a major bodily function.

(c) The prohibitions and requirements under Sections 171.043, 171.044, and 171.045(b) do not apply to an abortion performed on an unborn child who has a severe fetal abnormality.

Sec. 171.047. PROTECTION OF PRIVACY IN COURT PROCEEDINGS. (a) Except as otherwise provided by this section, in a civil or criminal proceeding or action involving an act prohibited under this subchapter, the identity of the woman on whom an abortion has been performed or induced or attempted to be performed or induced is not subject to public disclosure if the woman does not give consent to disclosure.

(b) Unless the court makes a ruling under Subsection (c) to allow disclosure of the woman's identity, the court shall issue orders to the parties, witnesses, and counsel and shall direct the sealing of the record and exclusion of individuals from courtrooms or hearing rooms to the extent necessary to protect the woman's identity from public disclosure.

(c) A court may order the disclosure of information that is confidential under this section if:

(1) a motion is filed with the court requesting release of the information and a hearing on that request;

(2) notice of the hearing is served on each interested party; and

(3) the court determines after the hearing and an in camera review that disclosure is essential to the administration of justice and there is no reasonable alternative to disclosure.

Sec. 171.048. CONSTRUCTION OF SUBCHAPTER. (a) This subchapter shall be construed, as a matter of state law, to be enforceable up to but no further than the maximum possible extent consistent with federal constitutional requirements, even if that construction is not readily apparent, as such constructions are authorized only to the extent necessary to save the subchapter from judicial invalidation. Judicial reformation of statutory language is explicitly authorized only to the extent necessary to save the statutory provision from invalidity.

(b) If any court determines that a provision of this subchapter is unconstitutionally vague, the court shall interpret the provision, as a matter of state law, to avoid the vagueness problem and shall enforce the provision to the maximum possible extent. If a federal court finds any provision of this subchapter or its application to any person, group of persons, or circumstances to be unconstitutionally vague and declines to impose the saving construction described by this subsection, the Supreme Court of Texas shall provide an authoritative construction of the objectionable statutory provisions that avoids the constitutional problems while enforcing the statute's restrictions to the maximum possible extent, and shall agree to answer any question certified from a federal appellate court regarding the statute.

(c) A state executive or administrative official may not decline to enforce this subchapter, or adopt a construction of this subchapter in a way that narrows its applicability, based on the official's own beliefs about what the state or federal constitution requires, unless the official is enjoined by a state or federal court from enforcing this subchapter.

(d) This subchapter may not be construed to authorize the prosecution of or a cause of action to be brought against a woman on whom an abortion is performed or induced or attempted to be performed or induced in violation of this subchapter.

SUBCHAPTER D. ABORTION-INDUCING DRUGS

Sec. 171.061. DEFINITIONS. In this subchapter:

(1) "Abortion" means the act of using, administering, prescribing, or otherwise providing an instrument, a drug, a medicine, or any other substance, device, or means with the intent to terminate a clinically diagnosable pregnancy of a woman and with knowledge that the termination by those means will, with reasonable likelihood, cause the death of the woman's unborn child. An act is not an abortion if the act is done with the intent to:

(A) save the life or preserve the health of an unborn child;

(B) remove a dead, unborn child whose death was caused by spontaneous abortion;

(C) remove an ectopic pregnancy; or

(D) treat a maternal disease or illness for which a prescribed drug, medicine, or other substance is indicated.

(2) "Abortion-inducing drug" means a drug, a medicine, or any other substance, including a regimen of two or more drugs, medicines, or substances, prescribed, dispensed, or administered with the intent of terminating a clinically diagnosable pregnancy of a woman and with knowledge that the termination will, with reasonable likelihood, cause the death of the woman's unborn child. The term includes off-label use of drugs, medicines, or other substances known to

have abortion-inducing properties that are prescribed, dispensed, or administered with the intent of causing an abortion, including the Mifeprex regimen. The term does not include a drug, medicine, or other substance that may be known to cause an abortion but is prescribed, dispensed, or administered for other medical reasons.

(3) "Final printed label" or "FPL" means the informational document approved by the United States Food and Drug Administration for an abortion-inducing drug that:

(A) outlines the protocol authorized by that agency and agreed to by the drug company applying for authorization of the drug by that agency; and

(B) delineates how a drug is to be used according to approval by that agency.

(4) "Gestational age" means the amount of time that has elapsed since the first day of a woman's last menstrual period.

(5) "Medical abortion" means the administration or use of an abortion-inducing drug to induce an abortion.

(6) "Mifeprex regimen," "RU-486 regimen," or "RU-486" means the abortion-inducing drug regimen approved by the United States Food and Drug Administration that consists of administering mifepristone and misoprostol.

(7) "Physician" means an individual who is licensed to practice medicine in this state, including a medical doctor and a doctor of osteopathic medicine.

(8) "Pregnant" means the female reproductive condition of having an unborn child in a woman's uterus.

(9) "Unborn child" means an offspring of human beings from conception until birth.

Sec. 171.062. ENFORCEMENT BY TEXAS MEDICAL BOARD. Notwithstanding Section 171.005, the Texas Medical Board shall enforce this subchapter.

Sec. 171.063. DISTRIBUTION OF ABORTION-INDUCING DRUG. (a) A person may not knowingly give, sell, dispense, administer, provide, or prescribe an abortion-inducing drug to a pregnant woman for the purpose of inducing an abortion in the pregnant woman or enabling another person to induce an abortion in the pregnant woman unless:

(1) the person who gives, sells, dispenses, administers, provides, or prescribes the abortion-inducing drug is a physician; and

(2) except as otherwise provided by Subsection (b), the provision, prescription, or administration of the abortion-inducing drug satisfies the protocol tested and authorized by the United States Food and Drug Administration as outlined in the final printed label of the abortion-inducing drug.

(b) A person may provide, prescribe, or administer the abortion-inducing drug in the dosage amount prescribed by the clinical management guidelines defined by the American Congress of Obstetricians and Gynecologists Practice Bulletin as those guidelines existed on January 1, 2013.

(c) Before the physician gives, sells, dispenses, administers, provides, or prescribes an abortion-inducing drug, the physician must examine the pregnant woman and document, in the woman's medical record, the gestational age and intrauterine location of the pregnancy.

(d) The physician who gives, sells, dispenses, administers, provides, or prescribes an abortion-inducing drug shall provide the pregnant woman with:

(1) a copy of the final printed label of that abortion-inducing drug; and

(2) a telephone number by which the pregnant woman may reach the physician, or other health care personnel employed by the physician or by the facility at which the abortion was performed with access to the woman's relevant medical records, 24 hours a day to request assistance for any complications that arise from the administration or use of the drug or ask health-related questions regarding the administration or use of the drug.

(e) The physician who gives, sells, dispenses, administers, provides, or prescribes the abortion-inducing drug, or the physician's agent, must schedule a follow-up visit for the woman to occur not more than 14 days

after the administration or use of the drug. At the follow-up visit, the physician must:

(1) confirm that the pregnancy is completely terminated; and

(2) assess the degree of bleeding.

(f) The physician who gives, sells, dispenses, administers, provides, or prescribes the abortion-inducing drug, or the physician's agent, shall make a reasonable effort to ensure that the woman returns for the scheduled follow-up visit under Subsection (e). The physician or the physician's agent shall document a brief description of any effort made to comply with this subsection, including the date, time, and name of the person making the effort, in the woman's medical record.

(g) If a physician gives, sells, dispenses, administers, provides, or prescribes an abortion-inducing drug to a pregnant woman for the purpose of inducing an abortion as authorized by this section and the physician knows that the woman experiences a serious adverse event, as defined by the MedWatch Reporting System, during or after the administration or use of the drug, the physician shall report the event to the United States Food and Drug Administration through the MedWatch Reporting System not later than the third day after the date the physician learns that the event occurred.

Sec. 171.064. ADMINISTRATIVE PENALTY. (a) The Texas Medical Board may take disciplinary action

under Chapter 164, Occupations Code, or assess an administrative penalty under Subchapter A, Chapter 165, Occupations Code, against a person who violates Section 171.063.

(b) A penalty may not be assessed under this section against a pregnant woman who receives a medical abortion.

SECTION 4. Section 245.010(a), Health and Safety Code, is amended to read as follows:

(a) The rules must contain minimum standards to protect the health and safety of a patient of an abortion facility and must contain provisions requiring compliance with the requirements of Subchapter B, Chapter 171. On and after September 1, 2014, the minimum standards for an abortion facility must be equivalent to the minimum standards adopted under Section 243.010 for ambulatory surgical centers.

SECTION 5. Section 245.011(c), Health and Safety Code, is amended to read as follows:

(c) The report must include:

(1) whether the abortion facility at which the abortion is performed is licensed under this chapter;

(2) the patient's year of birth, race, marital status, and state and county of residence;

(3) the type of abortion procedure;

(4) the date the abortion was performed;

(5) whether the patient survived the abortion, and if the patient did not survive, the cause of death;

(6) the probable post-fertilization age of the unborn child [~~period of gestation~~] based on the best medical judgment of the attending physician at the time of the procedure;

(7) the date, if known, of the patient's last menstrual cycle;

(8) the number of previous live births of the patient; and

(9) the number of previous induced abortions of the patient.

SECTION 6. Section 164.052(a), Occupations Code, is amended to read as follows:

(a) A physician or an applicant for a license to practice medicine commits a prohibited practice if that person:

(1) submits to the board a false or misleading statement, document, or certificate in an application for a license;

(2) presents to the board a license, certificate, or diploma that was illegally or fraudulently obtained;

(3) commits fraud or deception in taking or passing an examination;

(4) uses alcohol or drugs in an intemperate manner that, in the board's opinion, could endanger a patient's life;

(5) commits unprofessional or dishonorable conduct that is likely to deceive or defraud the public, as provided by Section 164.053, or injure the public;

(6) uses an advertising statement that is false, misleading, or deceptive;

(7) advertises professional superiority or the performance of professional service in a superior manner if that advertising is not readily subject to verification;

(8) purchases, sells, barters, or uses, or offers to purchase, sell, barter, or use, a medical degree, license, certificate, or diploma, or a transcript of a license, certificate, or diploma in or incident to an application to the board for a license to practice medicine;

(9) alters, with fraudulent intent, a medical license, certificate, or diploma, or a transcript of a medical license, certificate, or diploma;

(10) uses a medical license, certificate, or diploma, or a transcript of a medical license, certificate, or diploma that has been:

(A) fraudulently purchased or issued;

(B) counterfeited; or

(C) materially altered;

(11) impersonates or acts as proxy for another person in an examination required by this subtitle for a medical license;

(12) engages in conduct that subverts or attempts to subvert an examination process required by this subtitle for a medical license;

(13) impersonates a physician or permits another to use the person's license or certificate to practice medicine in this state;

(14) directly or indirectly employs a person whose license to practice medicine has been suspended, canceled, or revoked;

(15) associates in the practice of medicine with a person:

(A) whose license to practice medicine has been suspended, canceled, or revoked; or

(B) who has been convicted of the unlawful practice of medicine in this state or elsewhere;

(16) performs or procures a criminal abortion, aids or abets in the procuring of a criminal abortion, attempts to perform or procure a criminal abortion, or attempts to aid or abet the performance or procurement of a criminal abortion;

(17) directly or indirectly aids or abets the practice of medicine by a person, partnership, association, or corporation that is not licensed to practice medicine by the board;

(18) performs an abortion on a woman who is pregnant with a viable unborn child during the third trimester of the pregnancy unless:

(A) the abortion is necessary to prevent the death of the woman;

(B) the viable unborn child has a severe, irreversible brain impairment; or

(C) the woman is diagnosed with a significant likelihood of suffering imminent severe, irreversible brain damage or imminent severe, irreversible paralysis; [~~or~~]

(19) performs an abortion on an unemancipated minor without the written consent of the child's parent, managing conservator, or legal guardian or without a court order, as provided by Section 33.003 or 33.004, Family Code, authorizing the minor to consent to the abortion, unless the physician concludes that on the basis of the physician's good faith clinical judgment, a condition exists that complicates the medical condition of the pregnant minor and necessitates the immediate abortion of her pregnancy to avert her death or to avoid a serious risk of substantial impairment of a major bodily function and that there is insufficient time to obtain the consent of the child's parent, managing conservator, or legal guardian; or

(20) performs or induces or attempts to perform or induce an abortion in violation of Subchapter C, Chapter 171, Health and Safety Code.

SECTION 7. Section 164.055(b), Occupations Code, is amended to read as follows:

(b) The sanctions provided by Subsection (a) are in addition to any other grounds for refusal to admit persons to examination under this subtitle or to issue a license or renew a license to practice medicine under this subtitle. The criminal penalties provided by Section 165.152 do not apply to a violation of Section 170.002 or Subchapter C, Chapter 171, Health and Safety Code.

SECTION 8. Effective September 1, 2014, Section 245.010(c), Health and Safety Code, is repealed.

SECTION 9. This Act may not be construed to repeal, by implication or otherwise, Section 164.052(a)(18), Occupations Code, Section 170.002, Health and Safety Code, or any other provision of Texas law regulating or restricting abortion not specifically addressed by this Act. An abortion that complies with this Act but violates any other law is unlawful. An abortion that complies with another state law but violates this Act is unlawful as provided in this Act.

SECTION 10. (a) If some or all of the provisions of this Act are ever temporarily or permanently restrained or enjoined by judicial order, all other provisions of Texas law regulating or restricting abortion shall be enforced as though the restrained or enjoined provisions had not been adopted; provided, however, that whenever the temporary or permanent restraining order or injunction is stayed or dissolved, or

otherwise ceases to have effect, the provisions shall have full force and effect.

(b) Mindful of Leavitt v. Jane L., 518 U.S. 137 (1996), in which in the context of determining the severability of a state statute regulating abortion the United States Supreme Court held that an explicit statement of legislative intent is controlling, it is the intent of the legislature that every provision, section, subsection, sentence, clause, phrase, or word in this Act, and every application of the provisions in this Act, are severable from each other. If any application of any provision in this Act to any person, group of persons, or circumstances is found by a court to be invalid, the remaining applications of that provision to all other persons and circumstances shall be severed and may not be affected. All constitutionally valid applications of this Act shall be severed from any applications that a court finds to be invalid, leaving the valid applications in force, because it is the legislature's intent and priority that the valid applications be allowed to stand alone. Even if a reviewing court finds a provision of this Act to impose an undue burden in a large or substantial fraction of relevant cases, the applications that do not present an undue burden shall be severed from the remaining provisions and shall remain in force, and shall be treated as if the legislature had enacted a statute limited to the persons, group of persons, or circumstances for which the statute's application does not present an undue burden. The legislature further declares that it would have passed this Act, and each

provision, section, subsection, sentence, clause, phrase, or word, and all constitutional applications of this Act, irrespective of the fact that any provision, section, subsection, sentence, clause, phrase, or word, or applications of this Act, were to be declared unconstitutional or to represent an undue burden.

(c) If Subchapter C, Chapter 171, Health and Safety Code, as added by this Act, prohibiting abortions performed on an unborn child 20 or more weeks after fertilization is found by any court to be invalid or to impose an undue burden as applied to any person, group of persons, or circumstances, the prohibition shall apply to that person or group of persons or circumstances on the earliest date on which the subchapter can be constitutionally applied.

(d) If any provision of this Act is found by any court to be unconstitutionally vague, then the applications of that provision that do not present constitutional vagueness problems shall be severed and remain in force.

SECTION 11. (a) The executive commissioner of the Health and Human Services Commission shall adopt the standards required by Section 245.010, Health and Safety Code, as amended by this Act, not later than January 1, 2014.

(b) A facility licensed under Chapter 245, Health and Safety Code, is not required to comply with the standards adopted under Section 245.010, Health and Safety Code, as amended by this Act, before September 1, 2014.

SECTION 12. This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect on the 91st day after the last day of the legislative session.

President of the Senate

Speaker of the House

I certify that H.B. No. 2 was passed by the House on July 10, 2013, by the following vote: Yeas 96, Nays 49, 1 present, not voting.

Chief Clerk of the House

I certify that H.B. No. 2 was passed by the Senate on July 12, 2013, by the following vote: Yeas 19, Nays 11.

Secretary of the Senate

APPROVED: _____
Date

_____
Governor

APPENDIX I

Texas Administrative Code

TITLE 25	HEALTH SERVICES
PART 1	DEPARTMENT OF STATE HEALTH SERVICES
CHAPTER 139	ABORTION FACILITY REPORTING AND LICENSING
SUBCHAPTER D	MINIMUM STANDARDS FOR LICENSED ABORTION FACILITIES
RULE §139.40	Adoption by Reference of Ambulatory Surgical Centers Rules

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(a) Effective September 1, 2014, the department adopts by reference the following sections of Chapter 135 of this title (relating to Ambulatory Surgical Centers) that were in effect on January 1, 2014:

(1) Subchapter A (relating to Operating Requirements for Ambulatory Surgical Centers):

(A) The following definitions are incorporated by reference:

(i) §135.2(2) (defining "Action plan");

(ii) §135.2(6) (defining "Autologous blood units");

(iii) §135.2(7) (defining "Available");

(iv) §135.2(10) (defining "Dentist");

(v) §135.2(12) (defining "Disposal");

(vi) §135.2(13) (defining "Extended observation");

(vii) §135.2(14) (defining "Health care practitioners");

(viii) §135.2(16) (defining "Medicare");

(ix) §135.2(21) (defining "Surgical technologist");

(x) §135.2(22) (defining "Title XVIII");

(B) The following sections relating to ambulatory surgical centers operating requirements:

(i) §135.4 (relating to Ambulatory Surgical Center (ASC) Operation), except as specifically noted in subsection (d)(2) of this section;

(ii) §135.5 (relating to Patient Rights);

(iii) §135.6 (relating to Administration);

(iv) §135.7 (relating to Quality of Care);

(v) §135.8 (relating to Quality Assurance);

(vi) §135.9 (relating to Medical Records);

(vii) §135.10 (relating to Facilities and Environment);

(viii) §135.11(a) and (b)(1)-(18) (relating to Anesthesia and Surgical Services);

(ix) §135.12 (relating to Pharmaceutical Services);

(x) §135.13 (relating to Pathology and Medical Laboratory Services);

(xi) §135.14 (relating to Radiology Services);

(xii) §135.15 (relating to Facility Staffing and Training);

(xiii) §135.16 (relating to Teaching and Publication);

(xiv) §135.17 (relating to Research Activities);

(xv) §135.26 (relating to Reporting Requirements); and

(xvi) §135.27 (relating to a Patient Safety Program);

(2) Subchapter B (relating to Fire Prevention and Safety Requirements):

(A) §135.41 (relating to Fire Prevention and Protection);

(B) §135.42 (relating to General Safety); and

(C) §135.43 (relating to Handling and Storage of Gases, Anesthetics, and Flammable Liquids); and

(3) Subchapter C (relating to Physical Plant and Construction Requirements):

(A) §135.51 (relating to Construction Requirements for an Existing Ambulatory Surgical Center), except as specifically noted in subsection (d)(3) of this section;

(B) §135.52 (relating to Construction Requirements for a New Ambulatory Surgical Center);

(C) §135.53 (relating to Elevators, Escalators, and Conveyors);

(D) §135.54 (relating to Preparation, Submittal, Review and Approval of Plans, and Retention of Records);

(E) §135.55 (relating to Construction, Inspections, and Approval of Project); and

(F) §135.56 (relating to Construction Tables).

(b) As required by §4 of House Bill 2, passed in the Second Session, 83rd Legislature, 2013, the department intends by this adoption of rules to impose minimum standards for the health and safety of a patient of a licensed abortion facility, and that those minimum standards be equivalent to the minimum standards adopted under Health and Safety Code, §243.010, for ambulatory surgical centers.

(c) The minimum standards adopted by reference under this section are not applicable to a licensed abortion facility before September 1, 2014.

(d) Interpretive conventions. For purposes of this chapter:

(1) The words "ambulatory surgical center" and "ASC" and their plural forms in the rules that are adopted by reference in subsection (a) of this section are understood to mean "licensed abortion facility" or "licensed abortion facilities," as appropriate, for purposes of this chapter.

(2) The text of §135.4(c)(11)(B) that reads "or all physicians performing surgery at the ASC shall have admitting privileges at a local hospital" is not adopted by reference into this chapter.

(3) The text of §135.51(a)(1) and the portion of the text of §135.51(a)(2) that reads, "In lieu of meeting the requirements in paragraph (1) of this subsection," are not adopted by reference into this chapter.

(e) If the application of any particular rule that is incorporated by reference from Chapter 135 of this title is found by a state or federal court to violate the Constitution or impose an "undue burden" on women seeking abortions, the department shall continue to enforce the remaining incorporated rules that do not violate the Constitution or impose an "undue burden" on women seeking abortions, and shall continue to enforce all rules incorporated by reference from Chapter 135 of this title against abortion facilities for whom the application of such rules does not violate

the Constitution or impose an "undue burden" on women seeking abortions.

Source Note: The provisions of this §139.40 adopted to be effective January 1, 2014, 38 TexReg 9577

APPENDIX J

Texas Administrative Code

TITLE 25	HEALTH SERVICES
PART 1	DEPARTMENT OF STATE HEALTH SERVICES
CHAPTER 139	ABORTION FACILITY REPORTING AND LICENSING
SUBCHAPTER D	MINIMUM STANDARDS FOR LICENSED ABORTION FACILITIES
RULE § 139.53	Medical and Clinical Services

(a) Surgical abortion.

(1) The medical consultant shall be responsible for implementing and supervising the medical and clinical policies of the facility.

(2) All medical and clinical services of the facility, with the exception of the abortion procedure, shall be provided under the direction of a physician or registered nurse who assumes responsibility for the clinical employees' performance in the facility.

(3) A licensed abortion facility shall ensure that a surgical consent form is signed by the patient prior to the procedure being started, that the patient is informed of the risks and the benefits of the procedure, and that the patient recognizes the alternatives to abortion. Informed consent shall be in accordance with rules adopted by the Texas Medical Disclosure

Panel under §601.2 of this title (relating to Procedures Requiring Full Disclosure of Specific Risks and Hazards—List A), §601.4 of this title (relating to Disclosure and Consent Form), and Health and Safety Code, § 171.011 (relating to Informed Consent Required), and § 171.012 (relating to Voluntary Informed Consent).

(4) A licensed abortion facility shall ensure that the attending physician, advanced practice registered nurse, or physician assistant has obtained and documented a preoperative history, physical exam, and laboratory studies, including verification of pregnancy.

(5) A licensed abortion facility shall ensure that:

(A) the attending physician examines each patient immediately prior to surgery to evaluate the risk to the procedure; and

(B) the person administering the anesthetic agent(s) examines the patient immediately prior to surgery to evaluate the risk of anesthesia.

(6) The administration of anesthesia shall be in accordance with § 139.59 of this title (relating to Anesthesia Services).

(7) An abortion shall be performed only by a physician.

(8) A physician, advanced practice registered nurse, physician assistant, registered nurse, or

licensed vocational nurse shall be in the facility whenever there is a patient in the procedure room or recovery room. While a patient is in the procedure room or recovery room she shall not be left unattended.

(9) The recovery room(s) at the facility shall be supervised by a physician, advanced practice registered nurse, physician assistant, or registered nurse. This supervisor shall be available for recovery room staff within a recommended 10 minutes with a maximum required 15 minutes while any patient is in the recovery room.

(10) A physician shall be available for the facility while any patient is in the recovery room within a recommended 10 minutes and a maximum required 15 minutes.

(11) The facility shall ensure that a patient is fully reactive and her vital signs are stable before discharging the patient from the facility upon written order by the attending physician.

(12) All fetal tissue shall be examined grossly at the time of the procedure. In the absence of visible fetal parts or placenta, the tissue may be examined by magnification for the detection of villi. If this examination is inconclusive, the tissue shall be sent to a pathology lab. The results of the tissue examination shall be recorded in the patient's clinical record.

(13) A facility shall meet the requirements set forth by the department in §§1.131-1.137 of this title

(relating to Definition, Treatment, and Disposition of Special Waste from Health Care-Related Facilities).

(b) Medical abortion.

(1) The medical consultant shall be responsible for implementing and supervising the medical and clinical policies of the facility.

(2) All medical and clinical services of the facility, with the exception of the abortion procedure, shall be provided under the direction of a physician or registered nurse who assumes responsibility for the clinical employees' performance in the facility.

(3) A licensed abortion facility shall ensure:

(A) the physician(s) providing medical abortion is able to accurately date a pregnancy;

(B) the physician(s) is able to determine that the pregnancy is not an ectopic gestation;

(C) the physician(s) is able to provide surgical intervention or provide for the patient to receive a surgical abortion if necessary; and

(D) patients have access to medical facilities equipped to provide blood transfusion and patient resuscitation, if necessary.

(4) A licensed abortion facility shall ensure follow-up examination and services are provided to patients requesting medical abortion.

(5) A licensed abortion facility shall ensure that the attending physician, advanced practice registered nurse, or physician assistant has obtained and documented a pre-procedure history, physical exam, and laboratory studies, including verification of pregnancy.

(6) A licensed abortion facility shall ensure:

(A) written consent is obtained from the patient prior to the commencement of the abortion procedure;

(B) the patient is informed of the risks and benefits of the procedure;

(C) the patient is informed of the possibility that a surgical abortion may be required;

(D) the patient is informed of the alternatives to abortion; and

(E) informed consent is in accordance with rules adopted by the Texas Medical Disclosure Panel under §601.2 of this title, §601.4 of this title, and Health and Safety Code, § 171.011 and § 171.012.

(7) A licensed abortion facility shall provide the patient with written discharge instructions including a direct referral to a physician who shall accept the patient for surgical abortion.

(c) Requirements of a physician. A physician performing or inducing an abortion must, on the date the abortion is performed or induced, have active admitting privileges at a hospital that:

(1) is located not further than 30 miles from the location at which the abortion is performed or induced; and

(2) provides obstetrical or gynecological health care services.

Source Note: The provisions of this § 139.53 adopted to be effective June 28, 2009, 34 TexReg 4125; amended to be effective January 1, 2014, 38 TexReg 9577

APPENDIX K

Texas Administrative Code

TITLE 25	HEALTH SERVICES
PART 1	DEPARTMENT OF STATE HEALTH SERVICES
CHAPTER 139	ABORTION FACILITY REPORTING AND LICENSING
SUBCHAPTER D	MINIMUM STANDARDS FOR LICENSED ABORTION FACILITIES
RULE §139.56	Emergency Services

(a) A licensed abortion facility shall have a readily accessible written protocol for managing medical emergencies and the transfer of patients requiring further emergency care to a hospital. The facility shall ensure that the physicians who practice at the facility:

(1) have active admitting privileges at a hospital that provides obstetrical or gynecological health care services and is located not further than 30 miles from the abortion facility;

(2) provide the pregnant woman with:

(A) a telephone number by which the pregnant woman may reach the physician, or other health care personnel employed by the physician or the facility at which the abortion was performed or induced with access to the woman's relevant medical records, 24 hours a day to request assistance for any complications that arise from the performance or induction of

the abortion or ask health-related questions regarding the abortion; and

(B) the name and telephone number of the nearest hospital to the home of the pregnant woman at which an emergency arising from the abortion would be treated.

(b) The facility shall have the necessary equipment and personnel for cardiopulmonary resuscitation as described in § 139.59 of this title (relating to Anesthesia Services).

(c) Personnel providing direct patient care shall be currently certified in basic life support by the American Heart Association, the American Red Cross, or the American Safety and Health Institute, or in accordance with their individual professional licensure requirements, and if required in their job description or job responsibilities.

Source Note: The provisions of this § 139.56 adopted to be effective June 28, 2009, 34 TexReg 4125; amended to be effective January 1, 2014, 38 TexReg 9577